No. 90-____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

PHYLLIS ZAGANO,

Petitioner,

—against—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. ROBERT LUNNEY
Counsel of Record for Petitioner Phyllis Zagano
LUNNEY & CROCCO
641 Lexington Avenue
New York, New York 10022
(212) 355-0800

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Questions Presented for Review

1. Whether a federal district court may enjoin prior State proceedings brought pursuant to the State's police power to remedy discriminatory acts, in which the State is the complainant, in which there has been a determination of probable cause and in which the State has substantially completed its case-in-chief, based on the district court's dismissal with prejudice (without a trial or other consideration of the merits) of a separate, private action under Title VII.

2. Whether, in response to a plaintiff's pre-trial request to suspend a federal civil rights action, followed by a pre-trial motion for voluntary dismissal, for the purpose of completing hearings by and before a State agency, the district court should have dismissed the federal action "on the merits" without a trial.

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Opinions Delivered in the Case

The decision of the United States District Court for the Southern District Court, by Judge Richard Owen, made March 15, 1989, denying petitioner's motion for voluntary dismissal, then inviting and summarily granting respondents' motion for involuntary dismissal, was made on the record, which appears at Appendix A, and is not officially or unofficially reported. The slip opinion of the same court, dated July 27, 1989, granting respondents' motion to enjoin the State proceedings, which appears at Appendix B, is not officially or unofficially reported. The opinion of United States Court of Appeals for the Second Circuit (by Judges Richard J. Cardamone, Ralph K. Winter and Frank X. Altimari) dated March 29, 1990, affirming the district court's dismissal and injunction, which appears at Appendix C, is officially reported at 900 F.2d 12 (2d Cir. 1990). The per curiam opinion of the Court of Appeals, dated May 18, 1990, denying petitioner's petition for rehearing, which appears at Appendix D, as of this date, has not been officially reported and is unofficially reported at 1990 U.S. App. LEXIS 8572 (2d Cir. May 18, 1990). The two probable cause determinations of the New York State Division of Human Rights that Fordham University engaged in the discriminatory acts complained of, dated March 4, 1986, which appear at Appendix E, have not been officially or unofficially reported.

Jurisdiction

The date of the entry of the judgment of the court of appeals sought to be reviewed is March 29, 1990. The date of the court of appeals' decision denying rehearing is May 18, 1990. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Statutes and Rule Involved

United States Code, Title 28 § 2283 (Anti-Injunction Act).

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Fed. R. Civ. P. 41. Dismissal of Actions

> (a) Voluntary Dismissal: Effect Thereof.
>
> . . . .
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

N.Y. Exec. Law § 290(2), (3) (New York State Human Rights Law).

> 2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of the state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
>
> 3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because

of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; . . . to eliminate and prevent discrimination in employment, . . . in educational institutions, . . . and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

Statement of the Case

This is a case of Professor Phyllis Zagano,[1] formerly of Fordham University, a Catholic woman who was denied faculty reappointment, and later, tenure, at the hands of respondents Fordham University and its communications department chairman, George N. Gordon, a published pornographer and author of virulently anti-Catholic diatribes in an obscene tabloid that thrives on the degradation of women

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1 Prof. Zagano (currently an associate professor at the Boston University College of Communication) holds five academic degrees including the Ph.D. (from the State University of New York at Stony Brook) and has published two books, a bibliography, thirty-six articles and forty-four review essays in numerous journals, including The Antigonish Review, The American Political Science Review, Book Forum, Journalism Educator, Journalism History, Journalism Quarterly, Journal of Broadcasting, Journal of Family and Culture, Philosophy and Literature, and This World, as well as in the Catholic publications America, Commonweal, Crisis, National Catholic Register and National Catholic Reporter. (Thirty-three of these publications appeared before the reappointment meeting in question, sixteen of which appeared during the time frame under evaluation for reappointment.)

and promotion of lascivious conduct. (No female faculty member in the department had ever been granted tenure.) Prof. Zagano comes to this court seeking to restore her fundamental right to have this dispute heard on the merits, of which she was unfairly deprived by the court below.

This is a meritorious case: The New York State Division of Human Rights ("SDHR"), which investigated and prosecuted Prof. Zagano's case as the deferral agency to the EEOC, found probable cause, after investigation, to conclude that "[Prof. Zagano's] creed and sex were considerations in [Fordham's] decision not to reappoint[ ] her" and that "the subsequent actions [Fordham] took against [Prof. Zagano] after she filed the complaint were retaliatory." Extensive proceedings were conducted by the SDHR, including seven days of hearings, in which the State's case-in-chief was practically completed.

In the meantime, Prof. Zagano, acting individually and pro se, commenced a Title VII action in federal district court. That action, filed after the SDHR commenced its case, proceeded slowly, as the district court and the parties deliberately deferred to the hearings that were ongoing before the SDHR. Then, as the SDHR proceedings approached completion, Fordham and Gordon shifted their strategy and started to push the district court for a trial, hoping to overtake (and thus preempt) the SDHR proceedings. When a tentative trial date was set, Prof. Zagano promptly wrote to the district court, stating: "There is presently underway a New York State Division of Human Rights hearing . . . which hopefully may conclude this year. In this hearing many of the issues in the matter pending before you may very well be resolved. Therefore, I request that this action, which I filed *pro se*, be placed on the suspense calendar, subject to restoration by either side."

Two weeks later, the district court orally denied the request. Within eight business days, Prof. Zagano served and filed a formal motion, with supporting memorandum, for voluntary dismissal, sacrificing her federal action to complete

the SDHR proceedings already in an advanced stage. (Indeed Prof. Zagano's repeated efforts to suspend or dismiss the action came within a month after the very first indication from any party (or the district court) that the case should even be scheduled for trial in the first place.) The district court took up the motion on the date scheduled for trial, summarily denied it, and directed Prof. Zagano's elderly, pro bono counsel to proceed immediately to trial, which he declared he was unable to do. (A4)[2] Counsel had advised Prof. Zagano, who was teaching in Boston, that her presence was not needed in court that day. The court then turned to opposing counsel and invited a motion to dismiss on the merits for failure to prosecute, and summarily granted such motion. (A4) Judgment dismissing the action "on the merits and with prejudice" was entered the next day.

Subsequently, Fordham and Gordon moved the district court for an injunction of the prior pending SDHR proceedings. Over the objection of the SDHR itself, the district court enjoined the State proceedings in their entirety, not only barring Prof. Zagano from her remedies in those proceedings, but precluding the SDHR from carrying out its statutorily-mandated functions with respect to the acts of discrimination that Fordham and Gordon committed. (A8-10) Prof. Zagano submits that the district court was without authority to interfere with the police power of the State and its statutory mandate, and that the district court's refusal to permit voluntary dismissal to complete the State proceedings denied Prof. Zagano due process of law.

Procedural Background

Because this is a case in which the procedural matters ultimately eclipsed the substantive matters, in effect determining the substantive issues, it is necessary to cover the procedural history in some detail.

This case began with acts of discrimination against Prof. Zagano in 1983 and 1984, in denial of her reappointment as

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2 Parenthetical references are to pages in the Appendices hereto.

an assistant professor in Fordham's Communications Department, followed by denial of tenure and other retaliatory actions. The person primarily responsible at Fordham for the advancement of Prof. Zagano was Prof. George N. Gordon, then the chairman of the Communications Department and Prof. Zagano's immediate superior. In discussing the non-reappointment, Gordon admitted to Prof. Zagano, a well-published scholar, that "You are perceived to be very much involved in Catholic matters and affairs" and "some do not like it." Gordon's disdain for "Catholic matters and affairs" is evidenced by his contributions to and support of *Screw* magazine,[3] which villifies Catholicism and unabashedly debases women.[4] (These writings were all during Gordon's tenure as Prof. Zagano's department chairman at Fordham.)

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3 *See* G. Gordon, *Screw You, Mind-Blowing Made Simple*, Screw, Aug. 8, 1983, at 3, col. 1; G. Gordon, *Screw You, They Rob From the Poor and Gag the Rest*, Screw, Oct. 17, 1983, at 3, col. 1; G. Gordon et al., *Screw You, Fifteenth Anniversary Kudos*, Screw, Nov. 14, 1983, at 3, col. 1. (Gordon's Fordham affiliation is prominently stated in those pieces.) Gordon also authored *Erotic Communications* (1980), a book in which he chronicles a college course he taught in which he "require[d] that every student attend one X-rated porno film *in a theatre* either in Nassau or New York County and report in writing the entire experience in detail." *Id.* at 247 (emphasis his).

4 Publication in *Screw* is indefensible under any first amendment analysis or under any concept of "academic freedom" as it is an obscene publication and has been judicially determined as such in the State of New York. *See* State v. Heller, 33 N.Y.2d 314 (1973) (*Screw* held "clearly obscene by any standard" in affirming convictions of its publishers and editors for criminal obscenity), *aff'g*, 72 Misc. 2d 549 (App. Term 1st Dep't 1972) (mem.), *aff'g*, 65 Misc. 2d 549 (Crim. Ct. N.Y. County 1971), *cert. denied sub nom.* Buckley v. New York, 418 U.S. 944 (1974); *see also* United States v. Various Articles of Obscene Merchandise, 411 F. Supp. 1328, 1330 (S.D.N.Y. 1976) ("The fact that [*Screw*] may still be available is thus more indicative of the difficulties of enforcement and the persistence of its publisher than of laxity in community standards."). Being obscene, *Screw* (and publication therein) is entitled to no First Amendment protection. Miller v. California, 413 U.S. 15 (1973).

A year before the federal action, Prof. Zagano sought redress by filing two related complaints before the Equal Employment Opportunity Commission (EEOC), at its New York City office, alleging discrimination on the basis of her sex and religion, and retaliation. The EEOC administratively deferred these matters to the New York State Division of Human Rights (SDHR), which, as the complainant, instituted proceedings. After a lengthy investigation and fact-finding hearings, the State made two findings of probable cause, after investigation (A23-25), concluding (1) that "[Prof. Zagano's] creed and sex were considerations in [Fordham's] decision not to reappoint[ ] her" and (2) that "the subsequent actions [Fordham] took against [Prof. Zagano] after she filed the complaint were retaliatory."

A public hearing before an SDHR Administrative Law Judge was scheduled for May 13, 1987, though it was adjourned twice at Fordham's request to October 26, 1987. The hearing then began, with opening statements and testimony by Prof. Zagano on the State's direct case, which continued on January 7 and March 24, 1988. Fordham began cross-examination on April 6, 1988, which was continued on May 6, 1988. The next several hearing dates were devoted to conciliation, July 22, October 25, November 17 and December 15, 1988, pursuant to § 465.7 of the SDHR Rules of Practice, 9 N.Y.C.R.R. § 465.7. Four additional hearings were scheduled.

But for intervening events in the district court, the remainder of the the State's case was completion of Fordham's cross-examination, and, primarily, Fordham's case-in-chief. The March 9 and 10 hearings were devoted to conciliation procedures. Further hearing dates set by the State for April 6 and 7, 1989 were interrupted by a motion to dismiss by Fordham. The Administrative Law Judge determined that the motion should be decided after completion of hearings, which he scheduled for August 1, 1989, later postponed to October 3, 1989. The October 3 hearing was never held as the district court by then enjoined any further litigation of Prof. Zagano's claims before the SDHR. (A8-10) The State pro-

ceeding has since remained in judicially-imposed suspended animation.

While the SDHR was conducting its proceedings, but before it had issued any process, Prof. Zagano received erroneous information that, in order to continue her claim of employment discrimination, she needed to obtain a "right to sue letter" from the EEOC. She thus wrote the EEOC requesting a "right to sue" letter. In response, despite the fact that State action was already proceeding, the EEOC issued two "notice[s] of right to sue", one for each complaint, which warned: "If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST" and stated that "With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge."

After learning that the "notices of right to sue" were unnecessary, Prof. Zagano immediately and repeatedly wrote to the EEOC requesting withdrawal of those notices. The EEOC flatly denied Prof. Zagano's request to withdraw the notices, stating that "Notices of Right to Sue, once issued, may only be withdrawn by the Commission upon a finding that there was agency error involved in the original issuance. There has been no agency error in this instance, thus, your request for withdrawal is not granted." The EEOC cautioned that "the Notices of Right to Sue, already issued, became null and void, (and may not be reissued) if not utilized prior to 90 days following their receipt by you. . . . Thus, if you intend to bring an action in Federal Court, you should commence the same in a timely manner."

Acting accordingly, Prof. Zagano filed (pro se) an action under Title VII in the Southern District of New York. Then, for the next four years, Fordham and Gordon engaged Prof. Zagano in voracious discovery and motion practice, including

fifteen days of depositions of her (never actually concluded) and production of thousands of pages of documents.[5]

Though Fordham and Gordon kept Prof. Zagano occupied in the federal action with motion practice and discovery, judicial involvement was minimal, comprising mainly occasional (once a year) "status" conferences, at which the progress of the SDHR proceedings was reported to the court, which acquiesced in deferring to the SDHR. (There was never even a scheduling order entered pursuant to Fed. R. Civ. P. 16.)[6]

Then, in late December 1988, Fordham and Gordon precipitously changed their litigation strategy and started pressing for a trial of the federal action.[7] (At this point, Fordham's case-in-chief was upcoming before the State, and hearings were scheduled for mid-March.) In response, at a conference on January 13, 1989, the court indicated a tentative March trial date.

After this abrupt change in the coordination of the cases, on February 13, 1989, Prof. Zagano wrote a letter to the district court requesting that the action be placed on the suspense calendar in view of the ongoing SDHR hearing. The letter stated:

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5 Prof. Zagano's mistaken filing of the federal action accorded procedural opportunities to Fordham and Gordon, as there was otherwise no discovery available to them before the SDHR. *See* SDHR Rules of Practice, 9 N.Y.C.R.R. §§ 465.1 *et seq.* (no discovery provisions), and they took full advantage. This was part of their strategy to wear out Prof. Zagano's resolve and to "lawyer her to death."

6 Fordham and Gordon acknowledged to the court that they had "agree[d] to adjourn a number of conferences that had been scheduled in this court because it seemed . . . that it was not appropriate to take up [the court's] time or to waste [counsel's] time with a case we in good faith were trying to settle in another forum."

7 As the supposed reason for this, Fordham and Gordon's counsel claimed that "[w]hen those settlement negotiations faltered [on December 15, 1988], everything changed, in my view." This is contradicted by Fordham's continued engagement in conciliation sessions in March 1989.

> There is presently underway a New York State Division of Human Rights hearing . . . which hopefully may conclude this year. In this hearing many of the issues in the matter pending before you may very well be resolved. Therefore, I request that this action, which I filed *pro se*, be placed on the suspense calendar, subject to restoration by either side.

Prof. Zagano specifically told Fordham and Gordon in advance that if her request was denied, she would then move to dismiss the case without prejudice, for the purpose of continuing the State hearings. At a conference on February 28, 1989, the district court denied Prof. Zagano's request in passing. Then, within eight business days, Prof. Zagano prepared and filed a full motion for voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(2), which the court initially set for hearing on March 31, 1989. (The court actually chose to take up the motion on March 15, 1989.)

In the motion for voluntary dismissal, Prof. Zagano pointed out in detail the status and progress of the ongoing SDHR proceedings with the eighth and ninth hearing sessions approaching in a matter of days and also setting forth and documenting the mistaken circumstances under which the federal action was filed, including Prof. Zagano's three earlier attempts to withdraw the proceedings to no avail. Prof. Zagano's pro bono counsel, who was retired and 77 years of age, also cited his personal inability to try two cases in two different fora in the space of less than a week. He had previously expressed his reservations about his own competence to try a federal case (never having done so before).

On March 15, having seen the motion papers for the first time shortly after 11 a.m., the court heard argument, took a break over the lunch hour, returned at 2 p.m. and summarily denied Prof. Zagano's motion for voluntary dismissal. (A2-6) The court then turned to Prof. Zagano's counsel and said, "I am directing that the case proceed. So, Mr. Poth, call your first witness. I realize you are not going to—[proceed today]" and then immediately turned to Fordham and Gordon's

counsel and invited a motion by them to dismiss with prejudice, and summarily granted such a motion. (A4) The court entered judgment the next day (without the requisite notice under local rules), dismissing the action "on the merits and with prejudice."

A week after judgment was entered, Fordham moved to dismiss before the SDHR, asserting that the State proceeding was now precluded by res judicata, as the district court's judgment stated that it was "on the merits." The State issued a ruling that it would defer the decision on the motion until completion of the hearing, pursuant to the SDHR's Rules of Practice, and scheduled a hearing for August 1, 1989. Fordham and Gordon then moved the district court for a permanent injunction of the State proceedings, rather than allow the State to determine the very issue Fordham and Gordon had submitted to it (res judicata). The district court granted the injunction. (A8-10) Prof. Zagano's appeal to the Second Circuit followed, from the judgment dismissing the action with prejudice and from the injunction order. The Second Circuit affirmed (A11-19) and denied Prof. Zagano's petition for rehearing (A20-22). This petition followed.

Reasons for Granting the Writ

I. INJUNCTION OF STATE PROCEEDINGS WAS AN UNLAWFUL INTERFERENCE WITH STATE POLICE POWER

The State of New York, Executive Department, Division of Human Rights, a non-party, was improperly enjoined from carrying out its statutory mandate. The SDHR is charged, as a matter of public policy, to address discriminatory practices. *See* N.Y. Exec. L. §§ 290-301; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 464 (1982). To this end, the State made two findings that there is probable cause to believe that Fordham engaged in unlawful discriminatory practices (A23-25), and prosecuted the case pursuant to its statutory mandate.

The mandate of the SDHR extends well beyond providing a forum for private claims of discrimination; it is an exercise of State police power:

> 2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of the state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
>
> 3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; . . . to eliminate and prevent discrimination in employment, . . . in educational institutions, . . . and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

N.Y. Exec. Law § 290(2), (3).

The functions, powers and duties of the SDHR are broad, *see* N.Y. Exec. Law § 295(1)-(16), and it is empowered, among other things, to test, investigate, make, sign and file complaints alleging violations *on its own motion*, *id.* § 295(6)(b) (emphasis added), and to remedy discriminatory practices well beyond what an individual federal or state plaintiff may do. *See id.* § 297(4)(c) (listing remedial mea-

sures the SDHR may implement).[8] In fact, compensation of an aggrieved individual or directing reinstatement are but two of the remedies the SDHR may effectuate. *See id.* § 297(4)(c)(ii) and (iii).[9] Indeed, the State has standing, for example, to require payment to the *State* of profits obtained by a respondent through the commission of unlawful discriminatory acts. In short, the State is concerned with matters well beyond the concerns of a private litigant such as Prof. Zagano. The district court's injunction of the State from acting in those areas was clearly improper, as it was an unlawful federal interference with state police power, reserved to the states.

For this reason, injunction of the State proceedings is indefensible under the doctrine of res judicata, under which "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Because the scope of the State proceedings and the powers of the SDHR to remedy discrimination are substantially broader than the private remedies available in a Title VII civil action, res judicata cannot bar such remedies. Moreover, res judicata effect cannot be applied to proceedings in which the standard of proof is less. Since the strict rules of evidence prevailing in courts of law or equity are also not binding in State proceedings, N.Y. Exec. Law § 297(b), the State's evidentiary burden is necessarily less. Here, the fact that Prof. Zagano's private civil action under Title VII was dismissed should not preclude the State from prosecuting

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8 The SDHR initiated the proceedings on the complaint of Phyllis Zagano. The SDHR determined in its discretion to investigate and prosecute the case after the EEOC deferred Prof. Zagano's complaint to the SDHR.

9 Moreover, the case in support of a complaint is to be presented by attorneys or agents of the SDHR, as well as by the attorney for the individual complainant, at his or her option. *Id.* § 297(4)(a). The strict rules of evidence prevailing in courts of law or equity are also not binding. *Id.* § 297(b).

Fordham for discriminatory acts. The injunction improperly barred the SDHR from its statutory mandate.

The State itself asserted the impropriety of an injunction of proceedings over which it had concurrent jurisdiction, noting that it is "the New York State agency charged with the enforcement of the Human Rights Law and as the deferral agency under Title VII in New York State, the SDHR is uniquely qualified to decide questions of alleged unlawful discrimination." Further, the State asserted that "[i]nherent in this authority . . . is the authority to make a decision on the issue of whether a complaint is barred by New York State Law on *res judicata* grounds and also to defer this decision until such time as the record at the hearing has been completed." Further, the State noted that "[i]n its history of more than forty years, the SDHR has no record of having been enjoined by a federal court from proceeding on a matter which is already in the process of being heard in an administrative hearing . . . ." Nevertheless, the district court usurped the State's statutory and inherent authority and enjoined it from proceeding in any way whatsoever. This is unprecedented. Nor was the State a party to the federal action, subject to the district court's jurisdiction. Accordingly, the injunction directed at it by the district court was improper and should have been reversed.

II. THE COURT BELOW IMPROPERLY DENIED PETITIONER'S MOTION FOR VOLUNTARY DISMISSAL MADE IN ORDER TO COMPLETE STATE PROCEEDINGS

Certiorari should be granted here because the federal courts' discretionary latitude, based on Fed. R. Civ. P. 41, to deny a litigant substantive rights has reached an impermissible "high water mark" by this case. There has not been a reported decision, until now, that supports summary dismissal with prejudice of a plaintiff's case in response to a motion for voluntary dismissal where the avowed (and undisputed) purpose of the motion was to complete a pending,

active, State case involving the same underlying circumstances. Indeed the sanction of dismissal not only precluded the plaintiff's claims in that case but was also followed by a wholesale injunction of the State prosecuting another case involving the discrimination by Fordham.

Voluntary dismissal under Fed. R. Civ. P. 41 should be encouraged, as it has the salutary benefit of clearing the dockets for other litigants awaiting trial, who must already face a flood tide of backlogs, particularly in civil cases.[10] Federal courts should not chill voluntary dismissal by presenting an untenable dilemma. A plaintiff in good faith seeking voluntarily to end a case should not, in so doing, face possible foreclosure of all substantive rights through involuntary dismissal with prejudice. This especially should not be the case where the avowed purpose of voluntary dismissal is to complete ongoing State proceedings.[11]

In affirming the district court, curiously, the Second Circuit relied on its earlier decision in *Gravatt v. Columbia*

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10 The overall standard applicable to Fed. R. Civ. P. 41(a)(2) has been expressed as follows:

> Usually a court will grant a Rule 41(a)(2) motion providing for a dismissal without prejudice unless the defendant will suffer clear legal prejudice, other than the prospect of a subsequent suit on the same facts.

Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989) (citations omitted). "Moreover, the possibility that the plaintiff will gain a tactical advantage over the defendant in future litigation will not serve to bar a second suit" in a motion under Rule 41(a)(2). Davis v. USX Corp., 819 F.2d 1270, 1275 (4th Cir. 1987). *Accord* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.05[1], at 41-53, 41-62 (2d ed. 1988) ("While the basic purpose of Rule 41(a)(2) is to allow a plaintiff to dismiss an action without prejudice to future litigation, the dismissal must not unfairly jeopardize the defendant's interest. Accordingly, dismissal should in most instances be granted, unless the result would be to legally harm the defendant . . . [S]ubstantial prejudice to the defendant should be the test."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 165 (1971 & 1989 Supp.).

11 Here, there was no prospect of recommencement of the federal action, as the petitioner has tendered a covenant not to recommence the case in federal court, leaving only the State proceedings in which to pursue her case.

Univ., 845 F.2d 54 (2d Cir. 1988). (A19) *Gravatt* was superficially similar insofar as it was also a discrimination case against a university. Mr. Gravatt commenced an action in the Southern District of New York. He had commenced a second, similar, suit in the Northern District of Illinois. After difficulties in his Southern District action resulting from his lack of cooperation with the court in discovery, Mr. Gravatt bluntly stated to the Illinois District Court: " 'I am not going back there [New York] again. That case can sit there for ten years for all I care.' " *Id.* at 55. Following an unsuccessful motion to transfer the Southern District case to the Northern District of Illinois, and his failure to comply with the discovery schedule in the Southern District, Gravatt moved in the Southern District for voluntary dismissal, in response to which the court dismissed with prejudice.

Doing the opposite of what it did here, the Second Circuit in *Gravatt* reversed and remanded with instructions to the district court either to deny Gravatt's motion or, if it intended to convert the dismissal to one with prejudice, to afford the plaintiff an opportunity to withdraw the motion. If the motion was denied or withdrawn, the plaintiff was obliged to prepare the case promptly for trial, failing which involuntary dismissal for failure to prosecute would be appropriate. *Id.* at 57. *Gravatt* was a case of an out-and-out refusal to prosecute, following seriously uncooperative and obstreperous conduct. Yet, unlike this case, the plaintiff was nevertheless to "be afforded the opportunity to withdraw his motion [for voluntary dismissal]" and to proceed to trial for the court to consider dismissal with prejudice. In *Gravatt*, the Second Circuit applied restraint that it abandoned in this case:

> We sympathize with the evident exasperation of the District Judge and the Magistrate at Gravatt's conduct in this litigation. There are, however, adequate measures to deal with such conduct where circumstances warrant. *See* 28 U.S.C. § 1927 (1982); Fed.R.Civ.P. 11, 37. Rule 41(a)(2) ought not to become a mechanism to impose upon a plaintiff the extreme sanction of a dismissal with

> prejudice, at least where the plaintiff would rather pursue the litigation than accept that result.

Id. at 57;[12] *see also Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986) ("It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing *with* prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy.") (emphasis in text).

Here, while purporting to rely on *Gravatt*, the Second Circuit actually stretched precedent far beyond anything seen before under Fed. R. Civ. P. 41.[13] Indeed, the Second Circuit stretched precedent beyond anything seen before in any Circuit. A review of cases in other circuits amplifies how extreme the Second Circuit's ruling was in this case: *See, e.g., Bush v. United States Postal Serv.*, 496 F.2d 42 (4th Cir. 1974) (reversal of case dismissed with prejudice for failure to prosecute where attorney failed to appear at hearing on dismissal motion; the court noted that "[t]his record does not depict a history of deliberate delay. Nor does it establish that [plaintiff] was responsible for any derelictions of his attorney."); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980) (dismissal for failure to prosecute

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12 *Gravatt* is not distinguishable merely because there may not have been a trial date set at which Gravatt failed to appear. Gravatt unequivocally stated, in open court, his refusal to prosecute in the Southern District. Such a clear repudiation rendered the existence of a formal trial date immaterial.

13 The other principal case relied upon by the Second Circuit below was Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257 (E.D.N.Y. 1986) (Scheindlin, Mag.), a magistrate's memorandum decision in which, among the reasons for denying motion or voluntary dismissal, was that the court "must retain jurisdiction over defendant's compulsory counter-claims, even if plaintiffs' action were dismissed."). Here, by contrast, the effect of voluntary dismissal was the opposite: to reduce, not increase, the number of suits (with the immediate benefit of removing a case involving at least a one-week trial from the federal docket). Bosteve furnished no real authority for the Second Circuit's drastic action here.

reversed; "Dismissal with prejudice, however, is an extreme sanction that deprives a litigant of the opportunity to pursue his claim . . . . warranted only where a 'clear record of delay or contumacious conduct by the plaintiff' exists."); *Peterson v. Term Taxi Inc.*, 429 F.2d 888 (2d Cir. 1970) (dismissal with prejudice after plaintiff failed to appear at the designated time for trial reversed; the court stated: "Whatever the merits of plaintiff's case may be, in our opinion justice requires that he be given a fair hearing on his claim" and that " 'a court must not let its zeal for a tidy calendar overcome its duty to do justice.' "); *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (reversal of sua sponte dismissal for failure to prosecute; "the balance tips in favor of a trial on the merits rather than dismissal for want of prosecution" nor was there any indication that plaintiff was engaging in delay tactics, nor did the record indicate that any less drastic sanctions were first considered); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (in Title VII sex discrimination case, "the mere prospect of the transfer of litigation to State court was an insufficient basis for denying the motion for voluntary dismissal. 'Ordinarily the mere fact that a plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one court is as good as another.' " (citing *Young v. Southern Pac. Co.*, 25 F.2d 630, 632 (2d Cir. 1928) (Learned Hand, J., concurring)); district court's dismissal with prejudice in response to plaintiff's motion pursuant to Fed. R. Civ. P. 41(a)(2) reversed as an abuse of discretion; "in cases involving the scope of state law, courts should readily approve of dismissal when a plaintiff wishes to pursue a claim in state court".);[14] *Durham v. Florida E. Coast Ry.*,

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14 In *Davis*, the Fourth Circuit gives an exhaustive exegesis of the law in this area, drawing authority from the First, Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits as well as this Court.

Davis also speaks to respondents' main contention below that they were supposedly prejudiced by dismissal without prejudice in "wasted" discovery and preparation (that they voluntarily undertook):

385 F.2d 366 (5th Cir. 1967) (plaintiff sought voluntary dismissal after three weeks of trial in order to start the litigation anew because plaintiff's motion to amend his complaint to account for newly-discovered evidence had been denied as untimely; the court reversed the order of the district court denying dismissal because the record failed to disclose "any prejudice to the defendant . . . other than the annoyance of a second litigation upon the same subject matter. . . . 'The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a *careful* exercise of judicial discretion.' ") (emphasis in text); *see also Webber v. Eye Corp.*, 721 F.2d 1067 (7th Cir. 1983) (held that district court improperly dismissed case with prejudice when plaintiff was not present on scheduled trial date, though attorney was); *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031 (5th Cir. 1974) (district court abused its discretion by refusing to dismiss action without prejudice due to prospect of second suit despite contention by defendant that the subsequent suit would be frivolous); *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986) (held that it was not an abuse of discretion for the district court to dismiss voluntarily a suit without prejudice even though plaintiff intended to refile his claim in the state courts of another state in order to escape the bar of Alabama's statute of limitations; loss of a valid statute of limitations defense does not constitute a bar to dismissal under Fed. R. Civ. P. 41(a)(2)); *Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir.) (reversal of district court order denying dismissal on the ground that any prejudice to defen-

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It is evident from the record that the work and resources expended to date during this litigation will be easily carried over to litigation of the plaintiff's cause of action in state court. There is no basis, therefore, for concluding that the defendant will be prejudiced by a failure to impose this condition [payment of attorneys' fees for "wasted" discovery] on the plaintiff, especially when federal discovery will be useable in the state forum. *See* Tyco Laboratories Inc. v. Koppers Co., 627 F.2d 54, 56 (7 Cir. 1980) (extensive discovery is not prejudicial where evidence discovered may be used in subsequent action).

Id. at 1276.

dant could be cured through establishing appropriate terms and conditions for dismissal; held that such prejudice did not include the risk that the plaintiff's action would be refiled in a separate jurisdiction in order to escape the bar of the statute of limitations), *cert. denied*, 340 U.S. 813 (1950); *Home Owner's Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943) (rejecting defendant's contention that dismissal without prejudice would deprive defendant "of its alleged right to freedom from suit in another court upon the same cause of action"; held that "defendant does not have such an absolute right under" Fed. R. Civ. P. 41(a)(2)); *Clubb v. General Motors Corp.*, 14 Fed. R. Serv. 2d 1434 (4th Cir. 1971) (allegations of forum shopping are insufficient to support denial of motion for voluntary dismissal).

Furthermore, as the Fourth Circuit pointed out in *Davis*, citing this Court, "It must also be remembered that, absent compelling reasons or the consent of the parties, a district court's decision to condition dismissal on plaintiff's agreement not to assert state law claims in state court may unduly burden a plaintiff's right of access to such courts. Imposition of conditions limiting a plaintiff's recourse to the state courts may also be an affront to principles of comity because such conditions may usurp the authority of the state courts to resolve questions of state law. *See Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940) ('obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case'); *cf. Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (discussing principles of comity)." *Davis*, *supra*, at 1275; *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (certification of questions of state law by the federal courts "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism").

The discretion accorded under Fed. R. Civ. P. 41 is not absolute but carefully measured: "[I]n ruling on motions for voluntary dismissals, the district court should impose only those conditions which will alleviate the harm caused to the defendant" *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601,

604-05 (5th Cir. 1976); *Ali v. A & G Co.*, 542 F.2d 595 (2d Cir. 1976) ("The sound exercise of discretion requires a judge to use lesser sanctions than dismissal in the appropriate case."). Where dismissal with prejudice is involved (as opposed to mere denial of a voluntary dismissal motion) it is "generally permitted . . . only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Durham v. Florida E. Coast Ry.*, 385 F.2d 366, 368 (5th Cir. 1967). There was no such record here, and indeed, Prof. Zagano took affirmative steps to minimize duplicative and unnecessary litigation.

Moreover, as the Seventh Circuit pointed out in *Webber*, *supra*, that "[t]here is a well-established public policy favoring hearing cases on the merits" and that " 'courts have been created for the very purpose of trying cases on their-merits and that dismissals with prejudice and default judgments should not be utilized as a handy instrument for lessening the case load burden.' " *Webber v. Eye Corp.*, *supra*, 721 F.2d at 1071 (quoting *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973)).

This case is the the embodiment of the procedural quicksand that a civil rights plaintiff faces in the multi-fora enforcement scheme, particularly when an institutional adversary with an unlimited defense budget battles on procedural turf to avoid the merits.[15] When Prof. Zagano filed her fed-

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15 It has been observed that "even for the wary, Title VII's procedural steps constitute a series of land mines." Dees v. Orr, 33 Fair Empl. Prac. Cas. (BNA) 964, 966 (E.D. Cal. 1983). *See also* Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569 (W.D.N.Y. 1987) (noting "treacherous filing requirements of Title VII"). *See generally* B. Goldstein, *Representing a Victim of Employment Discrimination*, Litigation (Section of Litigation, American Bar Ass'n Spring 1987) (describing the "intricate and subtle dance" it takes for a practitioner to overcome "procedural hurdles" of an employment discrimination case); Comment, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U. Cal., Davis L. R. 749 (1985), noting that "Under Title VII, a complainant (an aggrieved job applicant or employee) must follow elaborate procedural steps to receive a

eral action, she did so out of mistaken concern that she had to do so to preserve her right to sue, based on the directives of the EEOC. In that action, she availed herself of practically no discovery (a single document request), and her only motion was for voluntary dismissal. While she had a right of full access to the federal court, she imposed on it very little. Indeed, the case was maintained in "suspense" for most of its duration and Prof. Zagano also sought to have the case formally placed on the court's suspense docket as a practical means of avoiding repetitive proceedings. While minimizing the burden on the court, Prof. Zagano was on the receiving end of practically all of the litigation, including five motions, an extraordinary 15 days (over 2,600 pages) of deposition and production of thousands of documents. Before respondents precipitously started to press for a federal trial (for tactical reasons, to preempt the State proceedings), the case had proceeded with full deference to the ongoing State proceedings, with the acquiescence of the parties and the district court.[16] Basically, Prof. Zagano's request to place the federal action on the district court's suspense calendar, followed promptly by her motion for voluntary dismissal, sought only to continue, for a short time, the course the parties and the district

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court hearing on the merits of her employment discrimination claim . . . . Those with little or no legal knowledge cannot decipher the statute's procedural complexities.").

16 *See* Saylor v. Bastedo, 623 F.2d 230, 239 (2d Cir. 1980) (defendants' "acquiescence in the course of the proceedings . . . gives a certain hollowness to their claims of prejudice through loss of oral testimony"; court and defendants shared blame equally with plaintiff for slow progress of case); *see also* Finley v. Parvin/Dohrmann Co., 520 F.2d 386, 392 (2d Cir. 1975) (court should "give such weight as is appropriate to a defendant's having contributed to such 'undue delays.' "; "the failure of a defendant to call the court's attention to a plaintiff's undue delay in bringing a case to trial . . . may be considered as a factor in informing the court's decision."); SEC v. Everest Management Corp., 466 F. Supp. 167, 171 (S.D.N.Y. 1979) (court denied defendant's motion pursuant to Fed. R. Civ. P. 41(b) as defendant said nothing about inactivity for six-year pendency of action; defendant's "silence over that long period of time is not to be ignored.").

court had charted from the beginning. The district court's draconian measures in response—dismissal with prejudice and wholesale injunction of the State proceedings that Prof. Zagano sought to complete—denied Prof. Zagano fundamental fairness in the process by which her claims should be resolved. Prof. Zagano respectfully requests this Court to review this case and to reinstate the State proceedings, so that her claims may be heard and resolved on their merits.

CONCLUSION

Petitioner requests this Court to grant a writ of certiorari to review the drastic action taken by the court below which denied petitioner any forum to resolve meritorious claims and improperly enjoined State proceedings in an unlawful interference with State police power.

Dated: New York, New York
August 16, 1990

/s/ J. ROBERT LUNNEY
J. ROBERT LUNNEY
Counsel of Record for Petitioner Phyllis Zagano
LUNNEY & CROCCO
641 Lexington Avenue
New York, New York 10022
(212) 355-0800

APPENDICES

Appendix A

Decision of the United States District Court for the Southern District of New York Dismissing Action

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 CIV 8706 (RO)

PHYLLIS ZAGANO,

Plaintiff,

v.

FORDHAM UNIVERSITY, GEORGE N. GORDON,

Defendants.

March 15, 1989
11:00 a.m.

Before:

HON. RICHARD OWEN,

District Judge

APPEARANCES

HARRY A. POTH,
CHRISTOPHER CONNELLY,
Attorneys for plaintiff

MARGARET BLAIR SOYSTER,
HOLLY CARTNER,
Attorneys for defendant

[52] AFTERNOON SESSION
2:00 p.m.

THE COURT: I have given quite some thought to this problem, both in anticipation of that motion and during the course of your argument, and I have reread a lot of these materials over the last half hour, and I feel obliged to deny this motion for a voluntary dismissal without prejudice. There are a number of, in my opinion, good reasons to deny it, and I cannot really think of any reasons to grant it.

If you take the various categories that are listed in such cases as Harvey Aluminum and Bosteve, this case is, indeed, on the day of trial, and Fordham has put in an enormous amount of expense to prepare for it.

I do not speak of duplicative expenses of second litigation, but I know personally from my own experience as a trial lawyer if you had a case that was ready to go and it was put off for four months, you had to do much of it again because you didn't keep it at your fingertips and it was all wasted. The motion was not diligently made, at no fault of the lawyer, but it was made on the eve of trial rather than being made a year ago or more.

Without passing on whether it was intended to be vexatious or not, the lawsuit has certainly turned into an instrument of vexation in the hands of the plaintiff with [53] these letters that are being written to alumni, to the trustees, to the president, all of it harassing and indeed almost an extortive kind of measure from their face, and, of course, the letter that I was shown this morning, marked Court's Exhibit 1, is really way beyond the pale and had to be done at the instigation of the plaintiff. I do not see why Mr. Heelan would have written this on his own.

Were there to be a further delay with witnesses here, even assuming that the state agency got down to work rather than just sitting around trying to see if the case couldn't be settled, the witnesses have died, others are retiring, others may die.

This case was set for trial on January 13 of 1989 and it wasn't until mid February that I got a letter from the plaintiff saying she wanted to put it on suspense, which would indicate to, it seems to me, a reasonable person that she was perfectly happy to have the lawsuit out there until all of a sudden she had to do something with it, and of course that's supported by this Heelan letter in January in which the statement is made that Phyllis Zagano's lawyers are ready to go to court and try this case. She said that to him. Presumably whether the lawyers were or were not is another matter, and we have some question about that. She said that to him, and I do take some umbrage at the fact that on this day with all of these problems and all of these **[54]** questions open that are left here for Mr. Poth to be dealing with, she is in Boston having absented herself and left him to deal with the court—

MR. POTH: Your Honor, no, I told her it was all right for her to go.

THE COURT: I know, but it seems to me there was some duty on her part to say, "Judge, I don't want to go forward with this case because," and I am given no "because" on her part, just that she would prefer to go forward with the action in the state, which, although there was a representation that it was going to go forward last week, apparently we had a lot of alleged settlement thumb twiddling, and I read these letters to the University about how "I am going to give money to her defense fund and therefore cut it back from my usual gift to the University", based upon her very provocative mailings, even if justified, to alumni and trustees.

To use an old legal expression, I have a feeling that the University is being horsed around by the plaintiff, and today was the day for her to have her day in court, or to commence her day in court, should this case take several days.

I do not deem it appropriate to permit her to voluntarily dismiss without prejudice, which would mean she could start it all over again in the future if she wanted to **[55]** do it, assuming the statute hasn't run, and this motion comes much too late.

It reasonably appears, as far as this case is concerned, she has really abandoned it, and I have really no ability to ask her, and I, therefore, do not have before me any adequate explanation of why she has taken the position that she has taken.

So the motion is denied. We, therefore, are to proceed to trial, which is what we were to do today, and I, therefore, direct that the case commence.

I gather, given what I have been told, that having directed the case to go forward the plaintiff, through counsel, probably is going to make some statement to me, given the court's direction that the case proceed.

I am directing that the case proceed. So, Mr. Poth, call your first witness.

I realize you told me that you are not going to—

MR. POTH: As you see, your Honor, I don't have any witnesses here. I advised Mr. Dorsa on two occasions within the last week or 10 days, as well as advising Ms. Soyster, that we were not going to proceed to trial today.

THE COURT: Or, I gather—

MR. SOYSTER: Or at any time in this action, that's correct.

[56] THE COURT: I take it there is a motion from the defendant?

MR. SOYSTER: Yes, your Honor. In light of that statement from Mr. Poth I would request that the case be dismissed under 41 (b) now due to plaintiff's failure to show any right to relief, which would be the same as a dismissal at the close of the plaintiff's case.

THE COURT: Based on everything that I have said earlier and we have said this morning, I am going to grant that motion, and the action is dismissed with prejudice.

I take it one or another party here will submit a judgment accordingly?

MR. SOYSTER: Yes, your Honor, I will.

THE COURT: Certainly at a minimum with costs and disbursements to the defendant.

MR. SOYSTER: Thank you, your Honor. We had requested attorney's fees in connection with the motion as well.

THE COURT: The thing that I am putting together in terms of phraseology is do you want any further briefing, anybody, on the issue of attorney's fees or are you prepared to go forward on the court's assessment of the applicability of Colombrito to this situation?

MR. SOYSTER: Your Honor—

THE COURT: Or do you want to argue further this [57] point and that's it? I will accept whatever you want to do.

MR. SOYSTER: I would like to reserve the right to consider and discuss with my client the possibility of making a motion as a prevailing defendant for attorney's fees. That's not covered by the papers that we have submitted.

I would like to pursue the request for attorney's fees in connection with the motion to dismiss which you have just denied. It would seem to me that it might be appropriate to supplement the record with more specific information as to the amounts and that sort of thing, which we did not do for reasons partly of time and partly of privilege, but those concerns are no longer pressing.

THE COURT: Is that agreeable to plaintiff? We will have further briefing on this issue of fees?

MR. POTH: Yes, your Honor. Obviously, I can't respond until I know what Ms. Soyster has in her mind, but one thing I gather from reading the practice books that I should make it clear that I'm not acquiescing or agreeing to—

THE COURT: Of course.

MR. POTH: It's just for proper lawyering, that's all.

(Discussion held off the record)

THE COURT: When will I receive briefing from you [58] all? What do you want? A couple of weeks? Two, three, four weeks?

MR. SOYSTER: That would be good.

THE COURT: Is that agreeable?

MR. POTH: I assume the defendant will go forward first.

THE COURT: Give me a brief. He can respond and you can respond to him. Otherwise, I will receive a dismissal with prejudice, costs and disbursements to the defendant.

MR. SOYSTER: Thank you, your Honor.

MR. POTH: The plaintiff reserving his position, not knowing what to do until we see the further pleadings and briefing.

THE COURT: Okay.

MR. POTH: Thank you, your Honor.

(Record closed)

Appendix B

Decision of the United States District Court for the Southern District of New York Enjoining SDHR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 8706 (RO)

PHYLLIS ZAGANO,

Plaintiff,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants.

OPINION AND ORDER

Appearances

Reid & Priest
Attorneys for Plaintiff
40 West 57th Street
New York, New York
Of Counsel: Harry A. Poth, Jr., Esq.

Rogers & Wells
Attorneys for Defendants
200 Park Avenue
New York, New York
Of Counsel: Margaret Blair Soyster, Esq.

Owen, District Judge:

Dr. Zagano brought this action against Fordham University and others, claiming that Fordham discriminated against her in her academic employment on the basis of her sex and her religion, in violation of 42 U.S.C. § 2000(e). Five years after filing the complaint, on the day set for trial, Dr. Zagano moved for voluntary discontinuance without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), giving as her reasons the advanced age and inexperience of her counsel, and her preference for informal, plaintiff-oriented state administrative proceedings, where the same claim has been pending for the same protracted period. After a hearing, at which the court noted ample evidence of vexatious, dilatory conduct by the plaintiff and no reasonable excuse for the failure to proceed, plaintiff's motion was denied. Instructed to proceed with the case, plaintiff's counsel informed the Court that he had no witnesses to call, that he could not then and would not ever be prepared to proceed to trial. After this "trial," Fordham moved for dismissal on the merits and with prejudice, pursuant to Fed. R. Civ. P. 41(b). By order dated March 16, 1989, the Court granted Fordham's motion for involuntary dismissal on the merits and with prejudice following the failure to make a case at the trial.

Fordham now seeks to enjoin Dr. Zagano from relitigating her claims before the New York State Division of Human Rights, at a hearing scheduled to take place, despite Fordham's attempt to assert the res judicata effect of this court's dismissal order, on August 1, 1989. In addition, Fordham moves for attorneys fees, under Rule 11, as a sanction for the belated voluntary dismissal motion, and for the overall unreasonable conduct of this case.

Under the circumstances, Fordham is entitled to an injunction against relitigation of these claims. Such an injunction is proper where, as here, it is necessary to protect the court's jurisdiction or to enforce its judgments. 28 U.S.C. § 1651. Where the injunction aims to prevent relitigation of issues barred by the doctrine of res judicata, it does not violate the anti-injunction statute, 28 U.S.C. § 2283. *Browning Deben-*

ture Holders' Committee v. DASA Corp., et al., 454 F.Supp. 88, 101 (S.D.N.Y.), *aff'd*, 605 F.2d 35 (2d Cir. 1978). If "the federal litigation has been unusually burdensome or protracted . . . ," *id.*, further litigation may cause irreparable harm to the prevailing party, already denied long-awaited repose. *Id*; *BGW Associates, Inc. v. Valley Broadcasting Co.*, 532 F.Supp. 1115, 1117 (S.D.N.Y. 1982); *see generally, Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 639 (2d Cir. 1987).

An injunction against further litigation of Dr. Zagano's claims is necessary to effectuate this court's March 16, 1989 order of dismissal on the merits and with prejudice. Fordham in the first instance properly addressed its res judicata defense to the State Department of Human Rights ("SDHR"), but, by letter dated June 8, 1989, the SDHR indicated that it would not rule on that defense until it had completed hearings and issued a proposed order. Fordham's experience with SDHR during the course of this litigation creates a reasonable basis for its fear that hearings will not be complete, and the case resolved, for quite some time.

Despite SDHR's apparent reluctance to recognize it, this court's order of dismissal clearly precludes further litigation of Dr. Zagano's claims. As stated at the hearing, the dismissal was "on the merits," based on plaintiff's failure to put on any case at the trial, for which defendants had gone through the trouble of preparing. *See Browning Debenture Holders'*, 454 F.Supp. at 98. The dismissal was a final adjudication, from which plaintiff could have appealed, and the parties and issues involved in the two cases are identical. *See Amalgamated Sugar Co.*, 825 F.2d at 639. Accordingly, there is no doubt that the order stands as a bar to further litigation of these claims in any other forum.

It is also clear that further delay in the resolution of this matter will cause Fordham irreparable harm, justifying an injunction. Dr. Zagano's various highly inflammatory letters to Fordham alumnae and friends demonstrate that the mere existence of any pending lawsuit gives her—as she sees it—the right to continue such communications. Having foregone the opportunity to fully air her grievances and establish her case, Dr. Zagano must realize that her claims are now completely

extinguished. Accordingly, Fordham's motion for an injunction against relitigation of any or all issues involved in this case is granted.

Fordham also has moved for Rule 11 sanctions against both Dr. Zagano and her attorney in connection with the delay in making the voluntary dismissal motion. At status conferences held on January 13, 1989 and February 22, 1989, a March trial date was established, but plaintiff's counsel did not disclose his intention to discontinue the action. Not until March 6, 1989 did plaintiff's counsel state that he would not proceed to trial and move to voluntarily discontinue the action. The reasons given for the failure to proceed to trial—advanced age of counsel and preference for plaintiff-oriented state proceedings—could not have developed during this period prior to trial; since plaintiff's counsel must have known of these impediments from the start, he could have discontinued the suit at an earlier date. By the time plaintiff finally did move to discontinue, defendants' counsel had been forced, needlessly, to prepare for a full trial.

Such costly, burdensome and unnecessary continuations of litigation is sanctionable. *See, e.g., Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986); 704 F.2d 652, 656-60 (2d Cir. 1983); *In Re Olympia Brewing Co. Securities Litigation*, 613 F. Supp. 1286, 1305 (N.D.Ill. 1985); *cf. Greenberg v. Hilton*, 870 F.2d 926, 938-39, *reh'g granted*, 875 F.2d 39 (2d Cir. 1989) (sanctions appropriate for making of burdensome discovery request without expectation of further use). However, as unfortunate as I find the untimeliness of plaintiff's voluntary dismissal motion, in the exercise of my discretion I decline to impose sanctions on plaintiff's counsel. As I see it, counsel's conduct did not arise so much out of bad faith on his part as out of the intransigence and irrationality of his client. Accordingly, Fordham's Rule 11 motion is denied.

Submit order on notice.

Dated: July 27, 1989
New York, New York

/s/ RICHARD OWEN
United States District Judge

Appendix C

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 779, 780—August Term, 1989

(Argued: February 14, 1990 Decided: March 29, 1990)

Docket Nos. 89-7757, 89-9007

PHYLLIS ZAGANO,

Plaintiff-Appellant,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants-Appellees.

Before:

CARDAMONE, WINTER and ALTIMARI,
Circuit Judges.

Plaintiff appeals from the decision of the United States District Court for the Southern District of New York (Richard Owen, *Judge*) denying plaintiff's Rule 41(a)(2) motion for dismissal without prejudice and granting defendants' motion to dismiss the action with

prejudice pursuant to Rule 41(b) after plaintiff refused to proceed with the trial of the case.

Affirmed.

ANDREW P. SAULITIS, New York, New York (J. Robert Lunney, Lunney & Crocco, New York, New York, of counsel), *for Plaintiff-Appellant.*

MARGARET B. SOYSTER, New York, New York (Holly A. Cartner, Rogers & Wells, New York, New York, of counsel), *for Defendants-Appellees.*

WINTER, *Circuit Judge*:

Plaintiff-appellant Phyllis Zagano, a former faculty member at defendant-appellee Fordham University, appeals from Judge Owen's dismissal of her complaint with prejudice. The week before the trial was to commence, Zagano moved for voluntary dismissal of her action under Fed. R. Civ. P. 41(a)(2) and then refused to proceed with the trial when that motion was denied. There was no abuse of discretion in the district court's actions, and we therefore affirm.

BACKGROUND

From 1980 to 1984, Zagano was employed by Fordham as an untenured assistant professor in its Department of Communications. George Gordon was

the chair of that department between 1981 and 1984. In July 1983, Zagano was informed that her teaching contract would not be renewed when it expired in August 1984. Thereafter, she pursued various internal and external remedies, including claims with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights ("SDHR"). After seeking and receiving a "right to sue letter" from the EEOC, which terminated the EEOC administrative investigation of her complaint, Zagano filed the present action *pro se* under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to -18 (1982).

Zagano's amended complaint, filed by counsel, alleged that Fordham's failure to renew her teaching contract was the result of illegal gender and religious discrimination. Zagano alleged that Gordon had published various pieces in the magazine *Screw* that were both pornographic and anti-Catholic. Zagano asserted that Gordon told her that her involvement in "Catholic matters and affairs" was one reason for her nonrenewal and that, in Gordon's view, the denial of reappointment would also avoid a "female tenure suit" in the future.

In the four years after Zagano filed the Title VII action, both parties pursued discovery and appeared for periodic pretrial conferences before Judge Owen. During this period two witnesses who had participated in the denial of Zagano's reappointment died. Two others, including Gordon, encountered poor health. Meanwhile, the SDHR found probable cause that discrimination had occurred, and a hearing on the merits commenced. Between October 26, 1987 and March 10, 1989, eleven

hearing sessions were held by the SDHR without completing the testimony of the first witness, Zagano.

A pretrial conference was held in the Title VII litigation on January 13, 1989. At that conference, defendants' counsel asked whether Zagano intended to pursue the federal action. Her counsel replied that she did. Judge Owen then scheduled the matter for a one-week trial to commence on March 6, 1989. When Zagano's counsel protested that discovery was not yet complete, Judge Owen extended discovery until February 15, 1989. Nevertheless, Zagano made no efforts at further discovery. After the January pretrial conference, defendants proceeded to prepare for trial. On February 13, 1989, however, Zagano, although still represented by counsel, sent a *pro se* letter to Judge Owen requesting that the federal case be "placed on the suspense calendar, subject to restoration by either side" in light of the ongoing hearing before the SDHR. At a status conference in late February, Judge Owen denied the request to place the case on the suspense calendar, but he moved the trial from March 6 to March 15, in part so that Zagano's trial counsel would not have to conduct proceedings before the SDHR and the district court at the same time. On March 6, 1989, appellant moved through counsel for voluntary dismissal of the case pursuant to Fed. R. Civ. P. 41(a)(2), stating as grounds that Zagano had brought the Title VII action "inadvertently" because she had not understood that issuance of a right-to-sue letter would terminate the EEOC's administrative proceedings. The motion also indicated that appellant's counsel preferred the SDHR as a forum because he was "optimistic of reaching a settlement" in the ongoing SDHR proceedings. Finally, Zagano's counsel claimed that he was

ill-equipped to conduct both the SDHR hearings and the federal trial because of advanced age and inexperience.

On March 15, 1989, the day on which the federal trial was to begin, Zagano's counsel appeared and indicated that Zagano did not intend to proceed with the case. After hearing argument on the Rule 41(a)(2) motion, Judge Owen denied it on the grounds that it had been made too late, that Zagano had used the federal action as an "instrument of vexation," and that defendants would be prejudiced because of the time spent preparing the case for the scheduled trial and the diminishing availability and recollection of witnesses. Judge Owen then directed Zagano's counsel to proceed with the trial, but he declined. Defendants moved for dismissal with prejudice pursuant to Fed. R. Civ. P. 41(b), and Judge Owen granted the motion. Plaintiff appeals.[1]

DISCUSSION

It is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial.[2] The only issue,

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1 After judgment was entered in this action, defendants sought and received an order from the district court pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1982), enjoining the plaintiff and the SDHR from relitigating her claims in frustration of the court's judgment dismissing the case "on the merits." Zagano appeals from that injunction but states that the propriety of the injunction turns as a practical matter upon the propriety of the dismissal of the action with prejudice. In view of our disposition of this matter, therefore, we need not address the merits of the injunction.

2 Fed. R. Civ. P. 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

therefore, is whether Judge Owen abused his discretion in denying plaintiff's Rule 41(a)(2) motion.

Rule 41(a)(2) provides that, except where all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Voluntary dismissal without prejudice is thus not a matter of right. Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. *See Bosteve Ltd. v. Marauszwki*, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D.N.Y. 1953); *see also Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985) (claim withdrawn after trial but before submission to jury dismissed with prejudice for plaintiff's failure to show need for retrial elsewhere); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969) (dismissal without prejudice properly denied where discovery considerably advanced and defendant's motion for summary judgment pending). Moreover, the denial of a motion to dismiss without prejudice will be reviewed only for abuse of discretion. *See Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1389 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 161-62 (1971 & Supp. 1990) (stating the standard of review).

The circumstances here amply justified the district judge's denial of the Rule 41(a)(2) motion. Under any test, the motion was made far too late. The action had been pending for over four years, during which it was contested vigorously, if sporadically, and extensive discovery had taken place. Zagano's counsel had affirmatively indicated at the January conference that she intended to pursue the Title VII action, and a firm trial date was set. Only when the trial was less than ten days away did Zagano seek dismissal without prejudice.

Judge Owen was also justified in concluding that granting the Rule 41(a)(2) motion would prejudice the defendants because of the resources they had spent in preparing after a trial date was set at the January conference. We also agree with Judge Owen that the likelihood of additional substantial delays in the SDHR proceedings might result in further loss of pertinent testimony through illness or death.

Appellant argues that she misunderstood her rights when she sought and received the EEOC's "right to sue letter" and that she mistakenly brought the federal action. Even if that is the case, it hardly explains why she made no attempt to correct that mistake until the very eve of trial. She also argues that she believed that defendants were using the federal action only for discovery to be used in the SDHR proceedings and did not intend to push for a trial in the federal case. The record does not support this view of the defendants' conduct but, even if it did, the district judge was well within his authority to insist that this matter go to trial absent a disposition agreeable to all parties.

The district court also properly determined that Zagano's other reasons for requesting dismissal, includ-

ing the ongoing state proceedings and the claimed inexperience of her counsel, were inadequate. The SDHR hearings had begun in October 1987, some fifteen months before she filed her Rule 41(a)(2) motion. In any event, they were proceeding at a pace that would consume months and perhaps even years to conclude.

Moreover, Judge Owen did not err in failing to give priority to the pending state administrative proceeding because the federal case presented no difficult questions of state law best resolved in a state court, *cf. Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (allowing dismissal to enable South Carolina courts to resolve imputed liability issue), and the prejudice to the defendant was considerably more than the mere "annoyance of a second litigation upon the same subject matter" in the state courts, *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366, 369 (5th Cir. 1967); *see also Young v. Southern Pac. Co.*, 25 F.2d 630, 632 (2d Cir. 1928) (L. Hand, J., concurring) ("Ordinarily the mere fact that a plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one court is as good as another." (citation omitted)). We are unimpressed by the claim that her counsel was aged and inexperienced. Notwithstanding the claimed infirmities, the same counsel was going to continue to represent her in the SDHR proceeding if the Rule 41(a)(2) motion were granted. In any event, the claimed limitations of counsel should have become apparent long before the eve of trial.

Finally, we note that Zagano had carried on a campaign seeking public support for her cause, including numerous communications to Fordham alumni and others, many of whom contacted Fordham officials on her behalf. Her communications, inter alia, sought financial

support for the federal litigation, indicating that she intended to pursue the matter. Near the time of the January conference she also led at least one supporter to believe that while she was eager to go to trial in the federal case, defendants' counsel was engaged in delaying tactics to avoid such a trial and to run up exorbitant legal bills. Judge Owen was not in error in concluding that Zagano's desire to abandon the Title VII action after imposing substantial costs on defendants was evidence that "she was perfectly happy to have the lawsuit out there until all of a sudden she had to do something with it" and that the action was an "instrument of vexation" against Fordham.

Zagano mischaracterizes the dismissal of her federal action as a summary and unexpected response to her motion to dismiss without prejudice, implying that she was not provided notice of the court's intention to convert her motion into a dismissal with prejudice. *See Gravatt v. Columbia Univ.*, 845 F.2d 54 (2d Cir. 1988). However, Judge Owen simply denied her motion and ordered her to go to trial. Her motion having been denied, Zagano was obliged to go to trial, "failing which involuntary dismissal for failure to prosecute [was] appropriate," *id.* at 57.

In sum, Zagano's refusal to proceed when the moment of truth arrived fully warranted dismissal of her case with prejudice.

Affirmed.

Appendix D

Opinion of the United States Court of Appeals for the Second Circuit on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1989

Decided: May 18, 1990

Docket Nos. 89-7757, 89-9007

PHYLLIS ZAGANO,

Plaintiff-Appellant,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants-Appellees.

RULING ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Before:

CARDAMONE, WINTER, and ALTIMARI,
Circuit Judges.

PER CURIAM:

Plaintiff-appellant seeks rehearing of the March 29, 1990 decision of this panel. Because the petition makes a legal argument that was expressly waived and contains unfounded and unfair attacks on appellant's prior counsel, we are compelled to explain our reasons for denying rehearing.

The petition for rehearing states that the panel "overlooked" the district court's allegedly improper action in enjoining the New York State Division of Human Rights ("NYSDHR") from adjudicating Zagano's claim before it. This is a bold misstatement. We declined to consider the propriety of the injunction because the NYSDHR filed no appeal and appellant's main brief stated that so far as her interest in the injunction was concerned, "the propriety *vel non* of the injunction depends on the propriety of the district court's dismissal of the action with prejudice." Brief of Plaintiff-Appellant at 44. Further, at oral argument, we made an express inquiry as to Zagano's position on the injunction, and counsel for Zagano stated, "My point there is that if the dismissal with prejudice is affirmed, then as a practical matter the case dies . . . ." Because we affirmed the dismissal with prejudice, we accepted counsel's invitation to regard the provisions of the injunction as a moot issue. It can hardly be said, therefore, that we "overlooked" the injunction.

Zagano also argues that she was denied the opportunity to proceed to trial after her motion for voluntary dismissal was denied. The motion for voluntary dismissal was argued and denied on the date set for the beginning of the trial. At no time did Zagano's counsel

indicate that she wanted to go to trial in the federal action but needed an adjournment to gather witnesses. Had such a request been made and denied by the district court, our calculus might be different. Instead, however, it was clear to all parties and the district judge that Zagano intended not to proceed to trial in the federal court. Indeed, appellees' counsel stated on the record that she had been informed by Zagano's attorney that Zagano did not intend to go to trial "at any time in this action." Zagano's counsel did not dispute the fact that he had made this statement or that it was true.

Finally, Zagano argues that because her trial counsel was "bewildered" when the motion for involuntary dismissal was denied, he failed to ask for more time. This claim is unfounded and unfair. We have examined the record carefully and the only "bewilderment" exhibited by Zagano's counsel was when he was confronted by evidence that she had very recently told a supporter that she was anxious to go to trial in the federal action but that Fordham was deliberately delaying the trial. Counsel's surprise over that evidence is understandable.

For the foregoing reasons, appellant's petition for rehearing is denied.

Appendix E

SDHR Probable Cause Determinations

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

SDHR CASE NO: IB-E-CS-84-94387E
FEDERAL CHARGE NO: 021-84-0527

(State Division of Human Rights on the Complaint of)

PHYLLIS ZAGANO,

Complainant,

—against—

FORDHAM UNIVERSITY

Respondent.

DETERMINATION AFTER INVESTIGATION

On December 20, 1983, Phyllis Zagano, who is a Catholic female, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of her creed and sex, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is *PROBABLE CAUSE* to believe that the respondent(s) engaged in or is (are) engaging in the unlawful discriminatory practice complained of.

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

DATED AND MAILED: March 4, 1986

STATE DIVISION OF HUMAN RIGHTS

By /s/ ARMANDO S. MARTINEZ
REGIONAL DIRECTOR
Armando S. Martinez

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

SDHR CASE NO: IB-E-O-84-94421E
FEDERAL CHARGE NO: 021-84-1303

(State Division of Human Rights on the Complaint of)

PHYLLIS ZAGANO,

Complainant,

—against—

FORDHAM UNIVERSITY

Respondent.

DETERMINATION AFTER INVESTIGATION

On January 31, 1984, Phyllis Zagano, who had filed a previous complaint, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of retaliation against her, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is *PROBABLE CAUSE* to believe that the respondent(s) engaged in or is (are) engaging in the unlawful discriminatory practice complained of.

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

DATED AND MAILED: March 4, 1986

STATE DIVISION OF HUMAN RIGHTS

By /s/ ARMANDO S. MARTINEZ
REGIONAL DIRECTOR
Armando S. Martinez

(3)

No. 90-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHYLLIS ZAGANO,

Petitioner,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Margaret Blair Soyster
(Counsel of Record)
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Respondents Fordham University and George N. Gordon

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion to deny a motion to dismiss without prejudice on the day of trial when (a) the motion was untimely, (b) substantial prejudice would have resulted from allowing an eleventh-hour abandonment of the case, (c) the interests of justice could best be served by resolving the controversy in federal court, and (d) the evidence of dilatoriness, bad faith, and vexatiousness on the part of the movant was considerable.

2. Whether it was an abuse of discretion to dismiss an action with prejudice when the plaintiff refused to go forward at trial in federal court on the day set for trial or on any future day.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in the caption.*

* In accordance with Rule 29.1 of this Court, respondent Fordham University states that it has no parent companies or subsidiaries.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-319

PHYLLIS ZAGANO,

Petitioner,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Fordham University and George N. Gordon oppose granting the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Winter, J., joined by Cardamone and Altimari, JJ.) is reported at 900 F.2d 12 (2d Cir. 1990). The per curiam opinion of the Court of Appeals for the Second Circuit, denying petitioner's petition for rehearing with suggestion for rehearing en banc, is reported at 900 F.2d 15 (2d Cir. 1990). The oral decision of the District Court for the Southern District of New York, denying petitioner's motion to dismiss without prejudice on the day of trial and granting respondents' subse-

quent motion to dismiss with prejudice after petitioner refused to proceed to trial, is unreported. The opinion of the District Court for the Southern District of New York, granting respondents' motion to enjoin further litigation in another forum of issues previously dismissed on the merits in the federal court, is reported at 720 F. Supp. 266 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on March 29, 1990. A per curiam opinion, denying a petition for rehearing with suggestion for rehearing en banc, was entered May 18, 1990. Discretionary jurisdiction to review the judgment of the court of appeals rests on 28 U.S.C. § 1254(1).

RULES OF PROCEDURE INVOLVED

The questions presented for review involve Fed. R. Civ. P. 41(a)(2) and Fed. R. Civ. P. 41(b).

Fed. R. Civ. P. 41(a)(2) provides, in relevant part:

> Except as provided in paragraph (1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(b) provides, in relevant part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for

improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

This is the Title VII case of an embittered university professor who abused the litigation process to advance her own vindictive ends and now seeks to have the Court relieve her of the inevitable consequences of her actions. It involves exclusively procedural issues under Fed. R. Civ. P. 41. The trial scheduled in the case never occurred because petitioner, Phyllis Zagano, refused to go to trial on the appointed day or on any future day, voluntarily eschewing the opportunity for a full airing of her claims in federal court.

A. The District Court Decisions

A series of three decisions by Judge Richard Owen of the District Court for the Southern District of New York provides the subject matter for the present petition.

1. Denial of Motion to Dismiss Without Prejudice

Eight days before the trial of her Title VII claims was set to begin, Zagano served a motion under Fed. R. Civ. P. 41(a)(2) for voluntary dismissal of the action, without prejudice. The motion was made more than four years after the commencement of the lawsuit and seven full weeks after the case had been scheduled for trial. Zagano argued that, due to the advanced age and claimed inexperience of the Reid & Priest litigator handling her case, she should be permitted to drop her federal action on the eve of trial in order to pursue her claims before the New York State Division of Human Rights ("SDHR") where "the rules of evidence and degree of proof are less rigorous."

Taking up the fully briefed motion as the first order of business on the day of the trial, the district court concluded, after extensive oral argument and a recess to re-read the papers, that "There are a number of, in my opinion, good

reasons to deny it, and I cannot really think of any reasons to grant it." (A2a).[1]

More specifically, the district court noted that Zagano's motion was not diligently made and came much too late; that respondents had already been put to enormous expense in preparing for trial; that the case was ready for trial; that there was an increasing risk of lost testimony due to the unavailability, illness, or death of witnesses; that, unlike the SDHR which was found to be "a tortoise in resolving these things," the federal court was "ready, willing and able in March 1989 to decide these issues"; and that the lawsuit had "turned into an instrument of vexation in the hands of the plaintiff" and "the University was being horsed around by the plaintiff." (A2a-4a). Based upon its recitation of the numerous compelling reasons for refusing to permit an eleventh-hour dismissal without prejudice, the district court denied Zagano's Rule 41(a)(2) motion.

2. Granting Motion to Dismiss With Prejudice

After denying Zagano's motion for voluntary discontinuance, the district court proceeded to the trial of the case which had been scheduled to begin that day. Zagano's counsel resisted the district court's instruction to call his first witness and indicated unequivocally that Zagano would not go forward with a trial on the merits of her claims in federal court on that day or on any other day.

In view of Zagano's refusal to proceed with the trial, the district court entertained and granted respondents' motion under Fed. R. Civ. P. 41(b) for dismissal of the action with prejudice and on the merits. (A4a).

3. Enjoining Further Litigation at the SDHR

Shortly after entry of the judgment dismissing Zagano's Title VII action with prejudice and on the merits, respon-

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1 Parenthetical references are to the Appendix to Zagano's Petition for Writ of Certiorari.

dents moved before the SDHR to dismiss Zagano's administrative charges on the basis of res judicata. When the SDHR deferred ruling on the motion until a hearing on the merits of Zagano's claims had been completed, respondents returned to the district court for an injunction rather than face the prospect of prolonged further litigation before the SDHR of issues they believed had been finally resolved. Respondents moved under the All Writs Act, 28 U.S.C. § 1651(a) (1983), for an order enjoining Zagano from further prosecuting either of her two pending SDHR charges and enjoining the SDHR from conducting any further proceedings with respect to either of the charges.

In an opinion, dated July 27, 1989, the district court granted respondents' motion on the grounds that an injunction against further litigation of Zagano's SDHR claims was necessary to effectuate the earlier federal dismissal order and that respondents would suffer irreparable harm if proceedings before the SDHR were permitted to continue. *Zagano*, 720 F. Supp. at 267-68. (A9a-10a).

B. The Court of Appeals Decision

On appeal, the Court of Appeals for the Second Circuit found that there had been no abuse of discretion in the district court's actions with respect to either Zagano's motion to dismiss without prejudice or respondents' motion to dismiss with prejudice.

With respect to Zagano's motion to dismiss without prejudice, the Second Circuit agreed with the district court that the circumstances "amply justified" denial of the motion under Fed. R. Civ. P. 41(a)(2). The court of appeals emphasized that the motion was made "far too late"; that granting the motion would prejudice respondents because of the resources they had spent preparing for trial; that the likelihood of additional, substantial delays in the SDHR proceedings might result in further loss of pertinent testimony through illness or death; that Zagano's reasons for requesting dismissal were inadequate; that there was no need to give priority to the

pending state administrative proceeding because the case presented no difficult questions of state law best resolved in a state tribunal; and that Zagano had used the case as an "instrument of vexation" against respondents. *Zagano*, 900 F.2d at 14-15. (A17a-19a).

Concerning respondents' motion to dismiss with prejudice after Zagano failed to go forward at trial, the court of appeals held that "[i]t is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial." *Zagano*, 900 F.2d at 14 (A15a). The Second Circuit also rejected Zagano's characterization of the dismissal of her federal action as a summary and unexpected response to her motion to dismiss, pointing out that the dismissal occurred in response to a motion made by respondents only after Zagano herself chose not to comply with a court order to go to trial. *Zagano*, 900 F.2d at 15 (A19a).

Although Zagano also appealed from the district court's order enjoining further litigation of Zagano's claims before the SDHR, the Second Circuit did not reach the merits of the injunction. In her appellate brief, Zagano had not undertaken to challenge the propriety of the district court's issuance of the injunction, but rather had simply argued that the propriety of the injunction depended upon the propriety of the dismissal with prejudice. Moreover, in response to a query at oral argument intended to explore Zagano's position with respect to the injunction, Zagano's counsel confirmed the view that "if the dismissal with prejudice is affirmed, then as a practical matter the case dies." Consequently, since the court of appeals upheld the dismissal with prejudice, it saw no need to address the injunction. *Zagano*, 900 F.2d at 13-14 n.1. (A15a).

C. The Court of Appeals Per Curiam Opinion

Zagano filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals took the unusual step of denying the motion in a per curiam opinion. The

court felt compelled to do so because Zagano's petition advanced a legal argument which had been "expressly waived" and contained "unfair and unfounded attacks" on her trial counsel from Reid & Priest. *Zagano*, 900 F.2d 15. (A21a).

The court of appeals reiterated the basis upon which it had refrained from passing upon the merits of the district court's injunction:

> We declined to consider the propriety of the injunction because the NYSDHR filed no appeal and appellant's main brief stated that so far as her interest in the injunction was concerned, "the propriety *vel non* of the injunction depends on the propriety of the district court's dismissal of the action with prejudice." Brief of Plaintiff-Appellant at 44. Further, at oral argument, we made an express inquiry as to Zagano's position on the injunction, and counsel for Zagano stated, "My point there is that if the dismissal with prejudice is affirmed, then as a practical matter the case dies. . . ." Because we affirmed the dismissal with prejudice, we accepted counsel's invitation to regard the provisions of the injunction as a moot issue.

Zagano, 900 F.2d 15. (A21a).

The Second Circuit also stressed again that Zagano's case had been dismissed with prejudice not because her attorney failed to request an adjournment of the trial or because the district court refused to grant one, but because of Zagano's own unequivocal decision not to go to trial in federal court "at any time in this action." *Zagano*, 900 F.2d 15. (A21a-22a).

REASONS FOR DENYING THE WRIT

I

THE QUESTIONS PRESENTED FOR REVIEW IN THE PETITION ARE NOT RAISED BY THE DECISION BELOW

Neither of the questions presented for review in Zagano's petition are raised by the decision below. Indeed, the first question which Zagano urges the Court to consider, concerning the district court's injunction against further litigation before the SDHR, is one which the court of appeals advertently did not reach because it had been "expressly waived" by Zagano, first in her brief on appeal and again at oral argument. *Zagano*, 900 F.2d 15. (A21a). *See also Zagano*, 900 F.2d at 13-14 n.1. (A15a). The court of appeals "accepted counsel's invitation to regard the provisions of the injunction as a moot issue." *Zagano*, 900 F.2d 15. (A21a).

It would be inappropriate for the propriety of the injunction to be reviewed for the first time in this Court. Moreover, Zagano has relinquished her right to challenge the injunction by failing to have done so before the court of appeals.

The second question presented by Zagano for review is one which the court of appeals did not decide because it is not raised by the facts of record. Zagano asks this Court to consider whether it is proper to dismiss an action on the merits without a trial in response to a motion for voluntary dismissal. Indisputably, however, no such action was taken in this case. When Zagano attempted to raise the same question in the proceedings below, the Second Circuit set her straight in definitive terms:

> Zagano mischaracterizes the dismissal of her federal action as a summary and unexpected response to her motion to dismiss without prejudice, implying that she was not provided notice of the court's intention to convert her motion into a dismissal with prejudice. *See Gravatt* v. *Columbia Univ.*, 845 F.2d 54 (2d Cir. 1988).

> However, Judge Owen simply denied her motion and ordered her to go to trial. Her motion having been denied, Zagano was obliged to go to trial, "failing which involuntary dismissal for failure to prosecute [was] appropriate," *id.* at 57.
>
> In sum, Zagano's refusal to proceed when the moment of truth arrived fully warranted dismissal of her case with prejudice.

Zagano, 900 F.2d at 15.

Since the question of dismissal with prejudice in response to a motion to dismiss without prejudice is not raised in this case, this Court could only render an impermissible advisory opinion.

II

THE CASE LACKS WIDESPREAD IMPACT OR NATIONAL IMPORTANCE

This case involves a routine exercise of judicial discretion following a thorough evaluation of Zagano's unique facts and circumstances in light of the well-established considerations which bear on whether a motion for voluntary discontinuance should be permitted under Fed. R. Civ. P. 41(a)(2). The outcome of the standard factual analysis in the circumstances of Zagano's particular case is of no consequence to any litigant other than Zagano herself. This Court should not squander its discretionary jurisdiction on a case, such as this, which lacks either widespread impact or national importance.

III

THE ISSUES RAISED BELOW WERE CORRECTLY DECIDED

Review is unwarranted in this case because the issues raised below were correctly decided.

A. Denial of Motion to Dismiss Without Prejudice

There can be no doubt that it is not an abuse of discretion to deny a motion to dismiss without prejudice where, as the court of appeals found here, (a) the motion was brought inexcusably late after the case had already been actively pending for over four years and a trial date had been set for seven weeks; (b) the defendants would be substantially prejudiced if the motion were granted; (c) the reasons given for the requested dismissal were inadequate; (d) the proposed alternative tribunal offered no cognizable advantages as a forum for resolving the controversy; and (e) there was evidence of vexatiousness and abuse of the litigation process on the part of the movant.

Indeed, to allow a voluntary dismissal in such circumstances would be to undermine Fed. R. Civ. P. 41(a)(2) which recognizes that once a case has advanced beyond the earliest stages, the interests of justice require that there be restrictions on a plaintiff's right to drop a case without prejudice. This case presented a model of the situation in which denial of a motion to dismiss without prejudice was required.

Significantly, not even Zagano goes so far as to contend that the facts here could not appropriately support an exercise of discretion refusing to allow a voluntary discontinuance. Instead, she contrives to distort the record by once again erroneously suggesting that the district court responded to her motion to dismiss without prejudice by precipitously dismissing her case on the merits and unfairly depriving her of an opportunity to have her claims heard in any forum. The record (A4a), however, leaves no doubt that Zagano's action was not dismissed with prejudice and on the merits until *after* her motion to dismiss had been denied and *after* she had been given the chance to present her case fully on the merits in the district court and *after* she had made clear, through her counsel, that she had no intention of ever proceeding in federal court.

B. Granting Motion to Dismiss with Prejudice

Authority to dismiss an action with prejudice under Fed. R. Civ. P. 41(b) "is vital to the efficient administration of judicial affairs and provides meaningful access for other litigants to overcrowded courts." *Lyell Theatre Corp.* v. *Loews Corp.*, 682 F.2d 37, 42 (2d Cir. 1982). In the face of the unequivocal stance of Zagano's counsel on the day of trial that Zagano would not proceed in federal court on that day or on any future day, there was no alternative but to dismiss the case on the merits under Fed. R Civ. P. 41(b) since, by that time, it had already been determined that a dismissal without prejudice would be unduly prejudicial to respondents.

This is not a case in which a blameless client was forced to pay a harsh penalty for a lawyer's shortcomings. As the district court concluded, it was Zagano's own "intransigence and irrationality" which caused the case to turn out as it did. *Zagano*, 720 F. Supp. at 268. Given the litigation strategy which Zagano adopted, the dismissal of her case on the merits was exactly what she should have expected.

C. Enjoining Further Litigation at the SDHR

If the SDHR proceedings had been permitted to continue following the federal court's dismissal of Zagano's Title VII action with prejudice and on the merits, Zagano would have achieved precisely what she had hoped to accomplish by her unsuccessful motion to dismiss without prejudice. She would have extricated herself from the federal court proceeding, at no cost to herself and at great cost to respondents, *and* remained free to pursue her claims in another forum just as if the federal action had never been brought. The district court's dismissal with prejudice would have meant nothing if Zagano had been permitted to try for a more favorable outcome before the SDHR. Zagano had her opportunity for her day in court, and she defiantly turned her back on it. It would have made a mockery of the federal court had Zagano been allowed to proceed in the SDHR as if a federal court

dismissal with prejudice and on the merits had no significance.

An injunction against further litigation by or on behalf of Zagano at the SDHR was necessary in order to effectuate and prevent the frustration of the district court's earlier order of dismissal of Zagano's action on the merits. Authority to issue such an injunction existed under the All Writs Act, 28 U.S.C. § 1651(a) (1983). Moreover, under Section 1651(a), the district court had the power to enjoin not only actions by a party to the pending federal court action, but also actions by a non-party, such as the SDHR, which was in a position to frustrate the implementation of a court order or the proper administration of justice. *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: September 19, 1990

Respectfully submitted,

Margaret Blair Soyster
(Counsel of Record)
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Respondents Fordham University and George N. Gordon

No. 90-319

In The

Supreme Court of the United States

October Term, 1990

PHYLLIS ZAGANO,

Petitioner,

-against-

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF FREE SPEECH ADVOCATES AND PRESSWATCH AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

CHARLES E. RICE
Counsel of Record for
Free Speech Advocates and
Presswatch, *Amici Curiae*
Notre Dame Law School
Notre Dame, Indiana 46556
(219) 239-5667

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

PHYLLIS ZAGANO,	)	
	)	
Petitioner,	)	Docket No. 90-319
	)	
v.	)	MOTION FOR LEAVE
	)	TO FILE BRIEF
FORDHAM UNIVERSITY	)	AMICUS CURIAE
and GEORGE N. GORDON,	)	
	)	
Respondents.	)	

Free Speech Advocates, of New Hope, Kentucky, and Presswatch, of Needham, Massachusetts, respectfully move for leave to file the annexed brief as amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of movants in this case arises from their special concern for the preservation of the right of parties

involved in disputes to use their right of speech to enlist others in aid of their cause. In its decision, the United States District Court emphasized what it called "Dr. Zagano's various highly inflammatory letters to Fordham alumnae and friends." Petition for Writ of Certiorari, 9a. Those letters were solicitations of verbal and moral support by or on behalf of the impecunious petitioner who had been arbitrarily terminated from her teaching position and who found herself without financial resources to defend herself against the university and its law firm. Movants are engaged in the defense, in the public forum and in litigation, of precisely the sort of financially overmatched free speech litigants typified by petitioner. Movants deplore the district court's use of petitioner's efforts, and the efforts of

others on her behalf, to raise money to finance her defense of her career as a factor in determining the outcome of the litigation in which she engaged. If this precedent is allowed to endure, the defense of free speech and related rights in litigation will become even more clearly an enterprise for the wealthy and well-funded than it is today.

In addition, this case involves a federal court's interference with state administrative proceedings. Movants are concerned with the preservation of such avenues in cases involving free speech and related rights. Here, especially, petitioner's (and others') exercise of

free speech rights resulted in an improper injunction of State proceedings.

Dated: September 14, 1990

Respectfully submitted,

Charles E. Rice
Counsel for Free Speech
Advocates and Presswatch,
Amici Curiae
Notre Dame Law School
Notre Dame, Indiana 46556
(219) 239-5667

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 90-319

October Term 1990

PHYLLIS ZAGANO,

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Respondents.

BRIEF OF FREE SPEECH ADVOCATES AND PRESSWATCH AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Free Speech Advocates and Presswatch submit this brief as amici curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF AMICI CURIAE

Free Speech Advocates is a legal defense group dedicated to protecting, preserving and defending the right of public witness and speech on interests of public concern.

Presswatch publishes a fortnightly newsletter that advocates balanced treatment in the media of public issues. Presswatch is also concerned in this case of the treatment of a university professor, who, it appears, was unlawfully discriminated against on the basis of her involvement in "Catholic matters and affairs."

Free Speech Advocates and Presswatch each have a special interest in the safeguarding of the First Amendment rights of those persons who, as litigants, exercise

such rights in advocating their causes and enlisting others in support of such causes. Such exercise should not be permitted to factor into a court's determination either of the merits of a litigant's case or of a litigant's procedural rights. In this case, it is the view of these amici that the courts below impermissibly abridged petitioner's First Amendment rights, in effect penalizing petitioner for the exercise of such rights and chilling the exercise of such rights by others. Specifically, the decisions of the courts below in this case, as grounds for dismissal of the petitioner's claims with prejudice, cited various communications by petitioner (and others) in support of her cause as a basis to deny her the opportunity to present her claims. It

is submitted that the use of such constitutionally protected communications as a significant, if not deciding, factor to deny petitioner any forum to determine her claims was an impermissible encroachment on petitioner's First Amendment rights, as well as a denial of due process of law.

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STATEMENT OF THE CASE

In this case, petitioner, Phyllis Zagano, requested that the district court, where she had filed a Title VII action, dismiss her case without prejudice so that ongoing, prior proceedings brought by and before a State agency, the New York State Division of Human Rights, could be

completed. These proceedings, in which the State was the complainant, arose from the same acts of discrimination and retaliation as underlied petitioner's federal action. The State proceeding -- which had been commenced first, in which probable cause had been found that discriminatory and retaliatory acts took place, and in which practically all of the State's case had been heard -- entailed a significantly broader spectrum of remedial action (not limited to private relief) than the federal action. Rather than permitting the State proceedings to be completed, the district court not only denied petitioner's motion for voluntary dismissal, but enjoined altogether the State proceeding, depriving Prof. Zagano (and the State) of any forum to determine serious and merito-

rious claims of discriminatory and retaliatory acts by Fordham University and its department chairman, George N. Gordon.

What is of greatest concern to these amici is that a significant, if not deciding, factor in the determinations of the district court and the court of appeals was Prof. Zagano's communications in support of her cause directed at persons whose support, financial and otherwise, Prof. Zagano sought to engage, and communications between and among third parties in support of Prof. Zagano.

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SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari because the decision of the district court, as affirmed by the Second Circuit, impermissibly abridges litigants' First Amendment rights, inasmuch as a significant, if not deciding, factor in denying petitioner's motion for voluntary dismissal, as well as dismissal with prejudice and injunction of independent State proceedings, was the exercise of petitioners' (and others') free speech rights.

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ARGUMENT

I. Certiorari Should Be Granted Because the Standards For Denying Voluntary Dismissal and Enjoining Ongoing State Proceedings Implicit in the Decisions Below Impermissibly Abridge Litigants' First Amendment Rights.

While purporting to invoke certain "factors" for voluntary dismissal set forth in a Magistrate's decision from the Eastern District of New York,[1] the district court primarily relied on its negative views of certain letters that Prof. Zagano had written over time to various persons seeking support for her cause,[2] and even more, on letters by

---

[1]Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257 (E.D.N.Y. 1986) (Scheindlin, Mag.).

[2]Prof. Zagano's letters, modest in number, were written to selected alumni of Fordham University and others with interest in the issues involved in the case, to raise funds for legal expenses in

third parties commenting unfavorably on the public position Fordham University had taken in the controversy. Referring to such third party letters (A 1-11),[3] the district court stated "as I skimmed through the various letters that [Fordham] President O'Hare has annexed to his affidavit, you certainly get a strong flavor, arguably, of vexatiousness." (A 23)

Having introduced this notion, the district court then unfairly leapt to the conclusion that "the lawsuit has certainly

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support of her cause and to gather moral support. The letters, while written with zeal, were factually accurate and not inflammatory.

[3]Parenthetical references preceded by "A" are to the Appendix to this brief, while parenthetical references followed by "a" are to the appendix to the petition. All matters in the Appendix hereto are from the joint appendix before the Court of Appeals for the Second Circuit.

turned into an instrument of vexation in the hands of the plaintiff with these letters that are being written to alumni . . . all of it harassing and almost an extortive kind of measure from their face . . . ." (2a) The record of the case is quite clear, however, that the district court was not basing this view on letters written by Prof. Zagano, but rather, letters written by third parties.

In particular, in support of its conclusions, the district court cited a letter by someone affiliated a non-profit family-life organization (The Couple to Couple League International Inc.) to a Richard J. Bennett (apparently a former trustee of Fordham University) expressing the author's views on the Zagano controversy. (A 15-17) The district court's tersely stated view of this (third-party) letter was "That stinks." (A

28) Then, the court concentrated on another letter offered by respondents' counsel from a Rev. Patrick A. Heelan, S.J. to a fellow Jesuit priest, Rev. Vincent Potter, S.J., which quite bluntly expresses Heelan's personal views on the controversy. (A 35-36) Though this letter was written by a non-party, the court became highly exercised over it, attributing it to Prof. Zagano: "He [the author] is obviously not writing this having made it up out of thin air. This is not rain that fell on his head, somebody gave him this information." (A 29)

The district court used these letters against Prof. Zagano as a basis to dismiss her action. Indeed, in this regard, the court stated: "[T]his is relevant, it seems to me, if credited, on the issue of whether or not Dr. Zagano has a right at this point to drop this suit and walk away

from it without cost to her but a terrible cost to you [respondents], and it is certainly some evidence -- Voltaire, vexatious as he might have wanted to have been, would have recognized that this [the Heelan letter] is defamatory, and therefore not privileged by the First Amendment." (A 30) Further, the court made repeated, and indiscriminate, reference to the various letters in connection with its decision: "Now, these letters to the trustees, to the alumni, to the president,[4] to Mr. Heelan asking him to write further[5] -- . . . I assume there

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[4]There were no letters by Prof. Zagano to the president or trustees of Fordham (or to any faculty, as the court elsewhere stated in error (25a)) regarding the controversy.

[5]There were no letters by Prof. Zagano to "Mr. [sic] Heelan asking him to write further." This was conjecture by the district court.

was an accompanying letter saying, 'Patrick [Heelan], write me a letter, do me a favor.' [The letter] creates a circumstantial prima facie case that she is using the publicity of this to further her goals in what we all could conclude, if we get down to Heelan's letter, is a wholly impermissible way. You don't go around calling the adversary lawyer a liar and this and that and the other."[6] (A 32; see also 3a ("I read these letters to the university about how 'I am going to give money to her defense fund and therefore cut it back from my usual gift to the University', based upon her very provocative mailings, even if justified, to alumni and trustees," referring to yet another

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[6]Evidently Fr. Heelan expressed his doubts concerning the credibility of one of Fordham's attorneys as to the cause of delay in the State proceedings.

third party letter.))

It is offensive to any First Amendment consideration that a court may use communications by third parties, let alone communications by a party, as the basis to label a litigant as "vexatious" and thereby deny voluntary dismissal and dismiss that litigant's case with prejudice, without any trial, and enjoin independent State proceedings.

The district court's adverse reaction to the various letters sympathetic to Prof. Zagano's cause was also in apparent disregard of the context in which those letters were written. In its glancing review, the district court failed to take into account the fact that the Zagano non-reappointment, Prof. Gordon's notorious Screw publications, and Fordham's publicly-proclaimed defense of "a tenured faculty member's decision to publish in

Screw" as "an exercise of academic freedom" had long since been the subject of emotional intra-Fordham and public debate and controversy. On its part, Fordham never shied from espousing its own position through the media. Indeed it appears that any letter-writing was precipitated by Fordham's president writing early on to National Review about the controversy. J.A. O'Hare, S.J., "Fordham Fracas II", National Review, Sept. 20, 1985, at 9 (letter to editor asserting Prof. Zagano's case to be without foundation and stating that a tenured faculty member's decision to publish in Screw "could and would be defended as an exer-

cise of academic freedom.") (A 1-11)[7]

(Prof. Zagano was responding precisely to

---

[7]"Dr. Phyllis Zagano's Quarrel with Fordham University," (statement issued by the Office of the President of Fordham defending the merits of its position) (Sept. 1987) (A 18-22); see also, e.g., F. Canavan, S.J., "Fordham Fracas", National Review, Aug. 23, 1985, at 6 (letter to editor by Fordham political science professor); J.A. O'Hare, S.J., "Commentary on Fordham 'reckless'", Waterbury Republican, Sept. 25, 1985 (letter to editor by Fordham president regarding Zagano controversy); J. Frawley, At Fordham Controversy Still Simmers Around Prof, National Catholic Register, Nov. 25, 1985, at 1, 12, 13 (statements by Fordham political science professor (F. Canavan, S.J.), chairman of Communications Department (T. Curran), vice president for academic affairs (R. Doyle, S.J.), communications professors (R. Dengler, S.J., G. Gordon and J. Phelan) and 19esident (J.A. O'Hare, S.J.)); E. Maillet, Fordham Case Pits Sleaze Against Scholarship: Academic Freedom But for Whom?, Eastern Oklahoma Catholic, Oct. 26, 1986, at 5, 18 (statement by Fordham president (J.A. O'Hare, S.J.)) and The Ram (Fordham publication), Apr. 18, 1985, at 1, 7, May 2, 1985, at 1, March 20, 1986, at 1 (statements by Fordham's president, executive vice president, defendant Gordon, sociology professor and Fordham's attorney).

that issue in the letters that the district court labelled "vexatious.")

It is indeed ironic that the district court chose to castigate one party for supposed participation in a sometimes-heated public controversy, but disregarded the fact that the other party (Fordham) had turned the controversy into a "media event" by repeated public airing of its position. As repugnant as the use of the exercise of free speech is as a factor determining a litigant's right to voluntary dismissal, it is even more repugnant when the other side to the controversy is somehow regarded as exempt from similar scrutiny, as appears to have been the case here. It is precisely the point of the First Amendment to protect this type of speech, so that controversial speech will not be silenced in a free society.

The district court's dismissal with prejudice did not end the district court's imposing penalties for the exercise of First Amendment rights by Prof. Zagano and others. The district court also used this as a factor in enjoining the State proceedings, cynically stating in its injunction decision that "Dr. Zagano's various highly inflammatory letters to Fordham alumnae [sic] and friends demonstrate that the mere existence of any pending lawsuit gives her -- as she sees it -- the right to continue such communications." (9a) It is not the existence of a lawsuit that gave Prof. Zagano the right to communicate about the controversy. It is the Constitution that gave her such right.

The district court then used an injunction to silence Prof. Zagano. Ironically, the court thus denied Prof. Zagano (and

the State) the only remaining forum for resolving the controversy on its merits.

While the Second Circuit did not dwell upon the various letters to the degree that the district court did, it fully acquiesced in the district court's reasoning and noted in its affirmance that "Zagano had carried on a campaign seeking public support for her cause, including numerous communications to Fordham alumni and others, many of whom contacted Fordham officials on her behalf . . . . Near the time of the January [1989] conference she also led at least one supporter to believe that while she was eager to go to trial in the federal case, defendants' counsel was engaged in delaying tactics to avoid such a trial and to run up exorbitant legal bills." (18a-19a) (The court of appeals' reference to Prof. Zagano's supposed action appears to be conjecture on its

part.) The court of appeals also acquiesced in the district court's conclusion (based on its antipathy toward the various letters) that "the action was an 'instrument of vexation' against Fordham." (19a) The court of appeals was equally content to permit legitimate exercise of First Amendment rights to factor into, if not determine, a voluntary dismissal motion, a dismissal with prejudice without a trial, and a wholesale injunction of proceedings by the State, thereby denying a last chance at final resolution on the merits.

These amici urge the Court to grant certiorari to review the precedents set by the district court and the court of appeals, which precedents are antithetical to the First Amendment rights of litigants. This case would enable a federal court to determine motions under Fed.

R. Civ. P. 41 on the basis not only of a litigant's communications in support of his or her case, but on the basis of the communications of third parties, to the severe detriment of the litigant, including the loss of substantive rights.

CONCLUSION

Free Speech Advocates and Presswatch, as amici curiae, respectfully request this Court to grant the petition for a writ of certiorari to review the action taken by the courts below which was impermissibly based in significant part on the exercise by petitioner (and others) of rights secured by the First Amendment, and also because the courts below unfairly denied petitioner any forum to resolve meritorious claims and improperly enjoined State proceedings, in which the State was

complainant, in an unlawful interference with the State's police power.

Dated: September 14, 1990

CHARLES E. RICE
Counsel of Record for
Free Speech Advocates and
Presswatch, Amici Curiae
Notre Dame Law School
Notre Dame, Indiana 46556
(219) 239-5667

A1

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Fordham Alumnus:

Fordham University says it is not a Catholic school. It is a Jesuit school. Maybe that's why its new President, Joseph A. O'Hare, S.J. dares to defend a faculty member who attacks decency and religion in pornographic magazines.

When I was an assistant professor of communications at Rose Hill, my chairman, George N. Gordon, wrote blasphemously in SCREW, the weekly anti-Catholic tabloid of pornography that "Jewish liberals shall all feel guilty, because only one who ever lived had a mother who was a virgin."

Father O'Hare finds this acceptable and defensible under "academic freedom." He's said so -- in National Review magazine (Sept. 20, 1985, p. 9). I am sure you agree with me that it is not. George Gordon's anti-religious statement above is just one example of many from his writings, including his writings in SCREW magazine which continued well after he tole me I would not be reappointed to the faculty of Fordham because I was, in his words, "too involved in Catholic matters and affairs" and "some don't like it."

Official Fordham may not like faculty

members involved in Catholic affairs, but I am sure you do. At great saving of time and money, I could have abandoned the principle and walked away. But I have filed a suit in Federal court to ask for reinstatement and compensation. Will you join me in this effort to make Fordham reaffirm itself as Catholic? I need help with my legal expenses to pursue this principled case, and anything you send me will be used for that purpose only. What you send Fordham this season will help defend George Gordon.

Please, let's both help Fordham be Fordham.

Sincerely,

/s/ Phyllis Zagano
Phyllis Zagano

A3

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

212 755-0051

December 1, 1986

Dear Bishop:

By now you have no doubt heard that when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "too involved in Catholic matters and affairs," and "some do not like it." Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin."

This shocking attitude is underscored by the fact that part of my "too Catholic" "matters and affairs" was my academic research into the media's reaction to the 1983 NCCB letter on war and peace. In fact, I've used a mailing label prepared for that study to write to you today. At great saving of time and money, I could have abandoned the principle and walked away. But I have filed a civil suit in Federal court to ask for reinstatement

and compensation. Will you join me in this effort to restore values to education? I would clearly prefer to be back full time at my academic research, but I need help with my legal expenses to pursue this principled case.

Sincerely,

Phyllis Zagano

P.S. In a separate action, the New York State Division of Human Rights has found "probable cause" that Fordham discriminated against me because of my sex and religion, and will soon order a public hearing on the matter.

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Member of the President's Club:

I am told that at a recent President's Club meeting, Mr. Richard Bennett, in response to a question about my situation as regards Fordham, said in substance "We took care of that a long time ago." I am writing to tell you that this is inaccurate.

As you may know, when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "very much engaged in Catholic matters and affairs," and "some do not like it." My department had voted 2 against and 3 abstain on the matter of my reappointment. Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin." As you probably know, obscene pornography is not protected speech under the First Amendment. I personally brought Gordon's writing to the attention of a Fordham administrator in September, 1983, yet Gordon continued as department chairman. In fact, he continued to write in SCREW. Please be advised that Gordon is still at

Fordham.

The Fordham president who presided over my final days at Fordham, Joseph A. O'Hare, S.J. has written that Gordon's SCREW statements "could and would be defended as a right of academic freedom" (National Review, Sept. 20, 1985, p. 9). He is presently circulating a statement which argues in part that "another Catholic woman" was recommended for tenure "at approximately the same time." Yet the woman received tenure well after I filed my 3 internal grievances (one of which -- on the matter of a Merit Raise -- was upheld by the Faculty Grievance Committee).

At great saving of time and money, I could have abandoned the principle and walked away. After extensive investigation, the New York State Division of Human Rights found "probable cause" that Fordham discriminated against me because of my sex and religion, and in March, 1986 ordered a public hearing. Fordham has caused such unreasonable delays that this hearing on the State's findings will not begin until October 26, 1987, if then. Fordham has also been delaying its provision of witnesses to the U.S. Department of Labor, which is conducting a separate investigation under Title 38 USC.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and a number of loyal alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case, and I need responsible individuals to continue

speaking the truth about this situation. Anything you can do to help me will no doubt help build a better Fordham.

Sincerely,

/s/Phyllis Zagano

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

Dear Fordham Alumnus:

As you may know, when I was an assistant professor of communications at Fordham University my chairman, George N. Gordon, was writing editorials in SCREW, the weekly anti-Catholic tabloid of hard core -- that is, legally obscene -- pornography. During the summer of 1983 Gordon told me I would not be reappointed to the communications faculty because I was, in his words, "very much engaged in Catholic matters and affairs," and "some do not like it." Shortly after, he wrote in SCREW magazine that "Jewish liberals shall all feel guilty because only one who ever lived had a mother who was a virgin." I brought this to the attention of a Fordham administrator in September, 1983, yet Gordon continued as department chairman and continued to write in SCREW. He is still at Fordham.

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My case against Fordham is so clear that the New York State Division of Human Rights, after extensive investigation, found "probable cause" that Fordham

discriminated against me because of my sex and religion, and in March, 1986 ordered a public hearing. Fordham caused such unreasonable delays that the State did not begin to present its findings until October 26, 1987, when the Fordham attorney objected strongly to the presence of onlookers. At a public hearing!!! The public hearing continued on January 7, 1988, but Fordham requested and obtained cancellation of the second hearing day. When my attorney was unavoidably delayed on April 6, Fordham first asked to cross-examine me without him present, and then tried to have the entire hearing day cancelled. Fordham did cancel half of the May 6 hearing, but despite Fordham's delays, a hearing is scheduled for June 17, 1988. Please join me then on the 10th Floor of 55 West 125th Street, New York City, beginning at 10:00 a.m.

Fordham has also been quite uncooperative in the U.S. Department of Labor's separate investigation under Title 38 USC, regarding the Fordham Communication Department's objection to my Naval Reserve commission.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and may alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case, and I need responsible individuals to continue speaking the truth about this situation. Anything you can do to help me will no doubt help build a better Fordham.

Sincerely,
/s/ Phyllis Zagano

PHYLLIS ZAGANO LEGAL FUND
Box 248 FDR STATION
NEW YORK, NEW YORK 10150

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My case is so clear that the New York State Division of Human Rights, after extensive investigation, found "probable cause" that Fordham discriminated against me because of my sex and religion, and in

March, 1986 ordered a public hearing. Fordham caused such unreasonable delays that the State did not being to present its findings until October 26, 1987, when the Fordham attorney objected strongly to the presence of onlookers. At a public hearing!!! The public hearing has continued, but so have Fordham's delaying tactics. Despite the delays, hearings are scheduled for March 9 & 10 and April 6 & 7, 1989. Please join me then on the 10th floor of 55 West 125th Street, New York City, beginning at 10:00 a.m.

I have also filed a civil suit in Federal court to ask for reinstatement and compensation, and many alumni have assisted me in this effort. I need help with my legal expenses to pursue this principled case (to my mind, Fordham has not explored settlement possibilities in good faith) and I need responsible individuals to continue speaking the truth about this situation. If you cannot assist me financially, perhaps you could contact Thomas F. X. Mullarkey, the Chairman of the Fordham Board of Trustees, to express your opinion on this matter. Anything you can do to help me will no doubt help build a better Fordham.

Sincerely,
/s/Phyllis Zagano

Thomas F.X. Mullarkey, Esq., FCO'54, LAW'59
Lazard Freres & Co., 1 Rockefeller Plaza, NY, NY 10020 (212) 373-6277, (212) 489-6600
FAX 212-974-2825

A12

October 6, 1988

Mr. Thomas F.X. Mullarkey, Esq.
FCO'54, LAW '59
Lazard Freres & Co.
1 Rockefeller Plaza
New York, New York 10020

Dear Mr. Mullarkey:

I am sure you are aware of the information Phyllis Zagano has sent to Fordham alumni.

I realize the facts as presented by Ms. Zagano are one sided and I was inclined to ignore them. However, eight years of Jesuit training prevailed and I find it necessary to at least question the institution that has occupied a special place in my heart since before I entered the Prep in 1942.

I cannot find fault with an administration that allows George Gordon to teach at Fordham, even if Ms. Zagano's charges are true. I suppose I would have to question a decision that moved anyone with those "credentials" to a position of power.

Of far greater importance to me are the charges that Ms. Zagano was discriminated against on the basis of sex (I have eight daughters) and that somehow she was discriminated against for being an active Catholic. I also find it unbelievable

that the Fordham I knew would object to a woman holding a Naval Reserve Commission.

At first blush the charges seem ludicrous and absurd. However, as a faithful alumnus I must ask for some sort of explanation of the situation. I would feel foolish splitting next year's donation between Fordham and Phyllis Zagano's legal fund.

Yours very truly,

AMDG

P.S. I am glad it is you and not I that has to read these letters.

ECUMENICAL CHRISTIAN MINISTRIES, INC.
THE ECUMENICAL CAMPUS CENTER
SIXTH AND ELM, HAYS, KANSAS 67601

"Protestant Ministry Serving the Campus Community of Fort Hays State University"

October 4, 1988

Thomas F. X. Mullarkey, Esq.
Lazard Freres & Co.
1 Rockefeller Plaza
new York, NY 10020

Dear Mr. Mullarkey:

As a friend of Phyllis Zagano I respectfully ask that you exercise your authority as Chairman of the Board of Fordham University to resolve as expeditiously as possible the protracted dispute between Dr. Zagano and the University. Although I am acquainted with this matter only from Dr. Zagano's perspective, I can assure that continued foot-dragging tactics do not enhance the perception of Fordham as an institution that respects and pursues truth wherever it may lead.

I have enclosed a statement I prepared on Dr. Zagano's behalf. Thank you for your consideration and for your willingness to make appropriate interventions.

Very truly yours,

cc: Phyllis Zagano

The Couple to Couple League
International, Inc.
... building healthy marriages through
natural family planning

July 12, 1988

Richard J. Bennett
10 Maple Drive
North Caldwell, NJ 07006

Dear Mr. Bennett:

The case of Fordham University versus Phyllis Zagano has dragged out now for over five years, and I ask of you that as a trustee of Fordham you instruct Father O'Hare to reappoint Professor Zagano and to stop the stalling on the legal hearings. I want to quote what I wrote to Father Joseph A. O'Hare on October 5, 1987.

> "Over the last 25 years I have seen ample indications of middle management problems within the Church, but the fact that your situation is not unique does not make it any less unjust. I suspect that someplace in the Constitution of Fordham University is some lofty statement about the pursuit of truth and justice, maybe even something about the development of personal character along Christian lines. But in your middle management you have someone who writes for a pornographic magazine and then from that perspective blocks the re-appointment

of a qualified person who is known to support the teaching of the Roman Catholic Church. Such prejudice and discrimination would be intolerable at a secular university; it should be unthinkable at a University that still chooses to be thought of as somehow Catholic. With all the talk about peace and justice in the world today and especially in the American Church, how can it be that you allow so much injustice and unrest in the case of Phyllis Zagano?"

Pope Paul VI coined the phrase "Justice is another name for peace." By the same token, injustice is the primary cause of discord and war. Injustice is of two types - - substantive and procedural, and Fordham appears guilty of both by the initial firing (technically non-reappointment) and by stalling in an apparent effort to wear down the suppliant. Well, what if you should succeed in breaking her" What if you cause something within her to snap? Will you then be satisfied? Will you then congratulate yourself that Fordham did rightly by not renewing her contract because, after all, anyone who can't take 5, 7, 10 years or whatever of psychological warfare shouldn't be allowed to teach at Fordham?

The next time you read a survey showing that people don't trust big business management, you have only to look in the mirror to discern why. During these past few days, the prophet

Hosea has been read at Mass, and his talk about the rich and powerful grinding the weak into the ground is all too applicable to the present case.

I know not if you are Catholic or care a whit about Catholic teaching, but if your going to be a trustee of a nominally Catholic institution you should know at least this much: the purpose of all Catholic teaching about social justice is to secure justice and peace <u>for the individual person</u>. Even if you should believe that Ms. Zagano received substantive justice by being de facto fired, do you in the depth of your heart believe she is receiving procedural justice by the University dragging this matter out for over five years?

Justice is another name for peace. Please act accordingly.

Sincerely,

FORDHAM UNIVERSITY
BRONX, N.Y. 10458

Office of
THE PRESIDENT

Dr. Phyllis Zagano's Quarrel with Fordham University

The decision not to reappoint Dr. Phyllis Zagano, when her contract as an assistant professor in the Department of Communications expired at the end of the school year 1983-84, was made in the spring of 1983. This decision was taken by the administration upon the recommendation of a departmental committee consisting of the then chairman and other senior members of the department. The deans of the Graduate School of Arts and Sciences and Fordham College concurred in that recommendation.

During the last year of her contract, 1983-84, Dr. Zagano appealed this decision directly to the administration and through various faculty committees. The administration asked her department to review her case once again. The department did so and and again recommended against reappointment, by an even stronger margin. A second faculty committee that reviewed the case found no reason to amend or set aside the decision not to reappoint her. Similarly, the faculty grievance committee that reviewed her case concluded that there had been no

violation of Dr. Zagano's academic freedom.

Peer evaluation is an essential part of decisions made concerning faculty members at American academic institutions. It is not uncommon for faculty members who are denied reappointment or denied tenure to claim that one or another form of bias influenced these evaluations. As a result, universities are continually involved in litigation with former faculty members who claim that the decisions made in their cases were the result of one or another kind of bias--racist, sexist, religious, ethnic, etc. Dr. Zagano's case is somewhat novel only because of the grounds on which she charges bias; she claims that the then chairman of her department told her that she would not be reappointed because she was "too involved in Catholic matters and affairs."

If this were the case, it would be a strange anomaly, since Fordham University is proud of its Catholic heritage and Catholic identity. Dr. Zagano's account of her conversation with her chairman, however, is disputed by the only other participant in that conversation. Whatever the truth of this dispute, other members of the departmental committee that recommended against her reappointment would deny most vigorously that such considerations entered into their judgment. I should point out that the same department, which included two senior members who are Jesuit priests,

recommended for tenure at approximately the same time another Catholic woman.

Dr. Zagano's case is now being heard in several different Federal and State tribunals. I cannot comment on these proceedings, but I should point out that the determination of the New York State Division of Human Rights that Dr. Zagano cites was a very preliminary ruling that merely provides that a hearing be held on her claim. To date, there has been no finding in any tribunal that the charges made by Dr. Zagano have any validity.

Along with pressing her case in these various tribunals, Dr. Zagano has also been engaged in a campaign to discredit the University by focusing attention on Dr. George Gordon, who was the chairman of her department at the time the decision was made. She points to the fact that some of Dr. Gordon's research before he came to Fordham was questionable and that during the summer and fall of 1983, he published three short op-ed pieces in Screw magazine. She also claims that I have defended Dr. Gordon's publication in Screw as an exercise of academic freedom.

The presence of Dr. Gordon at Fordham is, of course, an entirely separate matter from the question of Dr. Zagano's qualification for reappointment. Nonetheless, I hasten to provide some clarifications about Dr. Gordon since Dr. Zagano has persistently attempted to make him the central issue. Dr. Gordon was

hired as a full professor with tenure in 1981. His extensive publication record up to that time was available to those faculty members who considered his appointment, and one of these was Dr. Zagano herself. When his op-ed pieces in Screw magazine came to the attention of the University administration in the fall of 1983, Dr. Gordon was told that his choice of publication was offensive to many administrators and faculty at Fordham University. Since that time, no further writing by Dr. Gordon has appeared in Screw magazine.

When I assumed the office of President in July 1984, the issue of Dr. Zagano's reappointment was being reviewed by a special faculty committee. A few weeks later, I received the report of that committee indicating that it had found no justification for Dr. Zagano's claims of bias. I accepted the finding of that committee. I saw no reason to reopen a case that had been reviewed several times by the previous administration and various faculty committees.

A year later, in summer of 1985, the issue of Dr. Gordon's publication in Screw magazine once again became public, as Dr. Zagano sought to identify the issue of her own reappointment with the question of Dr. Gordon's suitability to teach at Fordham. The issue of Dr. Gordon's choice of publication in 1983 had been addressed in a reasonable way, it seemed to me, by the previous administration in January 1984. I saw no

reason to reopen this case a year and a half later, particularly when our University counsel points out that Dr. Gordon's choice of publication would probably not be considered by American courts sufficient ground for the dismissal of a tenured professor. While I would not and did not defend Dr. Gordon's choice of publication as a legitimate exercise of academic freedom, I recognized that many others would. Furthermore, I have seen no evidence in the three years that I have been President of anything less than professional conduct on the part of Dr. Gordon. In fact, from time to time I receive from students and faculty unsolicited expressions of respect for his teaching and other contributions to the University.

I look forward to the resolution of this controversy in the various tribunals in which it is being judged. Such a resolution would make it possible for Dr. Zagano to get on with her life and for the President of Fordham University to turn his attention to more interesting and more constructive projects than repeatedly rehearsing a dispute that took place four years ago, before I had assumed the office of President. Meanwhile, I regret that this unhappy episode has been the occasion for the dissemination of so much misleading and mistaken information about Fordham.

Joseph A. O'Hare, S.J
September 1987

TRANSCRIPT OF DISTRICT COURT PROCEEDINGS
MARCH 15, 1989

[11] THE COURT: Any indications of vexatiousness. I [12] don't know what the good judge in the Eastern District -- who was it?

MR. POTH: I think it was a magistrate, your Honor.

THE COURT: A magistrate?

MR. POTH: I'm pretty sure it was a magistrate. Shinewein.

THE COURT: A district judge made that the order of the court and got it published in West, is that what it amounts to?

MR. POTH: I don't know. The Federal Reporter shows a magistrate's decision, your Honor.

THE COURT: Whatever the word "indications" means, if you read, as I skimmed through the various letters that President O'Hare has annexed to his affidavit, you certainly get a strong flavor, arguably, of vexatiousness. Those letters are --

MR. POTH: Your Honor, have you read parts of our reply memorandum?

THE COURT: No, you tell me about that.

MR. POTH: Shall I do that now?

THE COURT: Letters to the faculty, to the alumni --

MR. POTH: Not only to faculty.

THE COURT: "I want money to pursue this [13] principled case in the federal court. I have filed a civil suit in the federal court and, alumni, I need help in my legal expenses to pursue this principled case," which is our case. I assume she got a kitty from some people.

MR. POTH: It wasn't a kitty, your Honor. She got a very small amount of money.

THE COURT: A very small pussy cat.

MR. POTH: Indeed, sir.

THE COURT: She is really going after him. She says this guy Gordon is outrageous for writing the Screw Magazine.

MR. POTH: I couldn't agree more.

THE COURT: Is that not vexatious to write such things to the alumni of the college?

MR. POTH: I will point out two things. It so happens that I spent some time as staff counsel of the American Civil Liberties Union and I have some familiarity with Freedom of Speech

cases. This to me is a prime example, and the words in the defendant's -- I guess it is in Father O'Hare's affidavit, that these people, the alumni, were recipients of her provocative material, that's what Voltaire and Thomas Paine were always accused of.

THE COURT: Maybe they were vexatious, too, in the name of Freedom of Speech, and protected.

MR. POTH: As an ex civil liberties lawyer, I [14] don't agree with the union on everything it does today, to settle that question, but it still is a constitutional right we have to protect.

THE COURT: Explore possibility in good faith.

MR. POTH: There is a New York Times editorial, don't read it now, but would you read it at sometime, that hits the nose exactly. It is this miserable program I have never seen that some woman complained to the radio stations that it was terrible and the advertisers apparently took heed.

The New York Times points out that exactly, that that is exactly what it should be. It says if the advertisers hereto translate that to the alumni, particularly the most generous givers, if they choose to heed such protests that's their business, and this is the whole purpose of free speech. This is one area in which I do have some expertise.

THE COURT: I couldn't agree with you more. I do not disagree with you at all, but the University at this point is saying we want these issues resolved to get this behind us.

MR. POTH: That's another issue, sir.

THE COURT: And that's what they are saying. Now, they may lose the case, they may win the case, but they say, we are tired of these letters, we are tired of alumni [15] writing to the president saying, "Am I going to have to split my gift to Fordham next year between the University and Phyllis Zagano's defense fund?"

MR. POTH: I thought all of those reply letters that Father O'Hare included were excellent letters.

THE COURT: They were, but the University wants the issue resolved.

MR. POTH: The ones that came back I thought were great.

THE COURT: They are fine letters, but they want a resolution.

MR. POTH: If I could finish. I agree with you, but it so happens that the University never raised the question of hurry or speed for going to trial immediately in this case until late December of last year.

Ms. Soyster, and I am not saying this critically at all, joined with me, or acquiesced, in the filing of, I don't remember at this point how many requests for adjournment of pretrial conferences, your Honor, that you had set.

There was never any complaint either by this court or by Ms. Soyster until late December when I asked Ms. Soyster, "What should we do about the federal court case? Shall we adjourn it again?" and she said, "No," and that was the first time we really started to press forward.

[16] So if we are talking about delay, Judge, delay is a factor only post December 15, whenever the last settlement conference was.

THE COURT: This letter writing campaign I gather began last fall?

MR. POTH: It goes back much further than that.

THE COURT: Some of the letters here seem to be October.

MR. POTH: Could be, yes. I have not seen, obviously, all the letters that my brother --

THE COURT: They are in the papers.

MR. POTH: I know. Before I had not seen all of the letters that my client, who tends to do things on her own, had

written, and I'm sure she has written a lot more than just the ones that are there.

THE COURT: This starts off, to Richard Bennett, trustee, "The Phyllis Zagano case has dragged out five years, as of 1st July. I ask you as trustee to instruct the president to reappoint her and stop stalling on the hearings. That stinks."

If I was trustee of the University I would be saying to O'Hare, "What's up?" And at that point he would call up his lawyer and say, "What's up?" And at that point she comes into the courtroom and says, "I want a trial."

MR. POTH: What was the date of that letter, your [17] honor? . . . .

[28] THE COURT: Do you have any of those letters to you?

[29] MR. SOYSTER: I have one of them with me.

THE COURT: May I see it, please?

MR. SOYSTER: Certainly. It is a letter to the academic vice president of Fordham which describes my bad behavior.

THE COURT: Who is Reverend Potter?

MR. SOYSTER: He is the academic vice president of Fordham and one of my primary contacts in terms of legal

representation of the University.

(Pause)

THE COURT: Mr. Poth, have you looked at the second paragraph of this thing?

MR. POTH: It shocks the hell out of me.

THE COURT: The second paragraph says, "If there is no negotiated settlement and the case goes to court, and Phyllis Zagano's lawyers are ready to go to court" -- here we are.

MR. POTH: Your Honor, I have nothing to do with this letter whatsoever. I am shocked by it. Patrick Heelan, who is a name fresh to me in any event --

THE COURT: He obviously is not writing this having made it up out of thin air. This is not rain that fell on his head, somebody gave him this information.

MR. POTH: I am shocked by it myself.

THE COURT: Where did he get this information? [30] From Mrs. Zagano?

MR. SOYSTER: I know where he got it: Dr. Zagano, of course. The chronology he refers to as if it is an official document which she prepared.

MR. POTH: It says at the bottom, "copies of other papers that Dr. Zagano

sent me. Best wishes for the New Year." Father Heelan, who is a Jesuit, Judge, I believe is or was Dr. Zagano's -- help me on this factually if you know -- superior or department head when she, Zagano, was a teacher or an assistant professor, whatever her title was, at the StonyBrook campus, where Heelan is.

MR. SOYSTER: More to the point, though, your Honor, is the fact that Father Potter is a philosopher and now the academic vice president of Fordham. These are professional colleagues and very serious allegations, and I might add, I hope unnecessarily, entirely erroneous allegations are being made from someone who is a person you normally would take seriously. This is the kind of thing.

I didn't put these on the paper because what is happening to me is not an issue. What is happening to Fordham and to Father O'Hare is an issue.

THE COURT: No, but this is relevant, it seems to me, if credited, on the issue of whether or not Dr. Zagano has a right at this point to drop this suit and walk away from it without cost to her but a terrible cost to you, and [31] it is certainly some evidence -- Voltaire, vexatious as he might have wanted to have been, would have recognized that this is defamatory, and therefore not privileged by the First Amendment.

MR. POTH: I'm not sure of that, your

Honor. There is a lot of case law on that one.

THE COURT: You cannot go around saying that a lawyer is lining her pockets and is a liar to the president of the University.

MR. POTH: Your Honor, I was merely speaking to the First Amendment question. As I said twice before, this shocks me, shocks the bejesus out of me.

THE COURT: In any event, I am marking this exhibit as Court's Exhibit 1 this date, being a letter of Patrick Heelan, State University StonyBrook, dated January 12 of 1989, to Reverend Vincent Potter, Fordham University. We will put a tag on that.

(Court Exhibit 1 marked for identification)

THE COURT: It seems to me that this is based upon something obviously that Mrs. Zagano --

MR. POTH: It says so here.

THE COURT: -- furnished him and told him and exhibits a state of mind in several directions, including the fact that she purports to say that she wants to go to trial today.

[32] MR. POTH: I don't know that it says that.

THE COURT: Paragraph 2: "Phyllis Zagano's lawyers are ready to go to court." You may not be ready to go to court, but she is.

MR. POTH: Judge, I'm not too sure that's any more accurate a statement than anything else that I read in this particular piece of paper.

MR. SOYSTER: If I could continue . . . .

[44] THE COURT: Now these letters to the trustees, to the alumni, to the president, to Mr. Heelan, asking him to write further --

MR. POTH: From Mr. Heelan.

THE COURT: No, she sent him a chronology and [45] other things, I assume there was an accompanying letter saying, "Patrick, write me a letter, do me a favor."

MR. POTH: I thought you said this letter.

THE COURT: -- creates certainly a circumstantial prima facie case that she is using the publicity of this to further her goals in what we all could conclude, if we get down to Heelan's letter, is a wholly impermissible way. You don't go around calling the adversary lawyer a liar and this and that and the other.

MR. POTH: I agree with that

absolutely.

THE COURT: My question to you is, at some point, and I want to quickly say to you, there is an attorney/client privilege here that you may wish to assert, but I would like to know what she said to you about why she is not going forward today.

You probably said to her, "Phyllis, this judge Owen, I have been before him, he is awful hard nosed about this thing. He has set this trial day, he has told me we are going, and I am telling you that there is a risk here that he is going to chuck this case out."

I am not asking you to tell me that that was what was said, but that's a conversation that probably happened.

MR. POTH: Obviously I can't say that or even nod my head, but I'm going to tell you something else, sir, I have been trying for sometime to convince her that we ought [46] to file a motion to dismiss. I probably should have --

THE COURT: Why didn't she?

MR. POTH: Could I finish, your honor?

THE COURT: Do you want to tell me what she said or do you not want to tell me?

MR. POTH: Obviously, I cannot,

because of the attorney/client privilege, tell you what she said, no.

The next thing in my notes is I was going to tell you what exactly happened.

THE COURT: Did she say anything to you that was to be communicated to me? Because then there is no longer a privilege.

MR. POTH: No, Judge, she certainly did not.

THE COURT: Did she say, "You tell the judge so and so and so and so," and if she said that, obviously there is no privilege.

MR. POTH: She likes you, Judge, so she did not say anything of that sort, to be transmitted to you.

THE COURT: My question is, if she wants to go forward, here is the day.

MR. POTH: Your Honor, if I could finish I think I can answer what you are asking.

I endeavored to persuade her for some time, and I will claim fault on my part in this, I should have done it sooner, there is no doubt. I suppose early January -- . . . .

StonyBrook
Department of Philosophy
State University of New York at Stony Brook
Stony Brook, New York 11794-3750

January 12, 1989

Reverend Vincent Potter, S.J.
Fordham University
Bronx, NY 10458

Dear Vinnie,

I am enclosing the Chronology of the Zagano-Fordham case which shows that the unconscionable five and a half year postponements are due to Fordham's lawyer, not Zagano's. The profile of the postponements suggests to me the following conclusions: 1. that the lawyer is lying in what she has told the President and others about the cause of the delay; 2. that her strategy is to consume the resources of the plaintiff; while 3. in a self-serving way, racking up legal fees for herself. The consequences are that, if and when the case comes to a negotiated settlement, Fordham will look worse and will have to pay more for the more extended period of personal injury.

If there is no negotiated settlement and the case goes to court--and Phyllis Zagano's lawyers are ready to go to court--her side will try to prove that the atmosphere of the Communications Arts Department was poluted against women

(track record of hirings, public reputation in her profession, personal conduct of members of the Dept., all male, including Jesuit, ex-Jesuit, anti-Jesuit, and non-Jesuit), against the Catholic Church and Catholic morality (Screw magazine; Gordon's Erotic Communications, etc.), and against the military of the USA (whatever it is, the military are supporting it). As I said to you, this is not an anti-Fordham case but an anti-Communications Arts Department case.

Having looked at the chronology of the case, what it suggests to me is that the Fordham lawyer has not served Fordham well, that the Fordham lawyer may be incompetent, that she may be self-serving, and that she may have misinformed the President about the substance and handling of the case in order to defend her own personal stake in the proceedings. These are just the hunches of one who has been involved in similar cases. I think it would be in Fordham's interest to have the handling of the case reviewed by a different lawyer and one in whom Fordham has confidence. But above all, everybody has a stake in a speedy resolution.

I am enclosing a copy of the Chronology and copies of some other papers that Phyllis sent me. Best wishes for the New Year!

Yours sincerely,
/s/ Patrick SJ
Patrick A. Heelan, S.J.